

Modeling Church and State: The Ideological Use of History in Establishment Clause Jurisprudence

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Modeling Church and State: The Ideological Use of History in Establishment Clause Jurisprudence

CHARLES KELBLEY*

ABSTRACT

Part I of the Article explores several contemporary models of the church-state relationship, which scholars in philosophy and law have articulated in recent work. In one way or another all of these models defend—explicitly or implicitly, and for varying reasons—a moderately strong sense of the separation of church and state, although ‘separation’ is not necessarily the major theme in any of the models. Parts II and III then address two Establishment Clause controversies, using these models as an informal template or resource for critical appraisal of the merits of selected Supreme Court decisions on the constitutionality of public displays of the Ten Commandments and the use of the words ‘under God’ in the Pledge of Allegiance. The Article’s principal argument draws attention to an ideological use of history to counter Establishment Clause claims by endowing Presidential Proclamations and other statements with constitutional significance and interpreting challenged religious language and symbolism as permissible and harmless ‘ceremonial deism.’

TABLE OF CONTENTS

I. Introduction.....	640
II. Variations on the Theme of Separation of Church and State	643
A. Feldman: Legal Secularism and Values Evangelicalism.....	647
B. Dworkin: A Religious or a Secular Nation?.....	653
C. Eisgruber and Sager: Separation and Equal Liberty.....	657
D. Nussbaum: Liberty of Conscience	662
E. Greenawalt: Religion and the Constitution	665
III. Finding a Place for the Ten Commandments	665
A. <i>Van Orden v. Perry</i> (2005).....	668
B. <i>McCreary County v. ACLU</i> (2005)	677
IV. Can “Under God” Be Defended on Reasonable Grounds?.....	681
A. The <i>Newdow</i> Case.....	684
B. Evaluating Justice O’Connor’s Endorsement Test.....	691

C. Should the Supreme Court Uphold “under God”?	698
V. Conclusion	699

I. INTRODUCTION

There is no list of approved and disapproved beliefs appended to the First Amendment—and the Amendment’s broad terms (“free exercise,” “establishment,” “religion”) do not admit of such a cramped reading. It is true that the Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that “the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects.” The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.¹

-Justice Sandra Day O’Connor

This Article is part of a broader argument about the need to achieve a common political conception of justice that all citizens can in principle endorse, one that is based on political values that define the unity of a society. Thus political justice is freestanding, independent of varying religious, moral, and philosophical doctrines (“comprehensive doctrines”). While I do not engage with that broader argument here, I want at least to indicate that major themes of this Article draw inspiration from the ideal of political justice, which John Rawls described at length in his later work, *Political Liberalism*.² In that book he revised his famous earlier book, *A Theory of Justice*,³ by explaining the limits of religious and moral doctrines

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1. *McCreary v. ACLU*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 1783-1787 183, 186 (Gaillard Hunt ed., 1901) [hereinafter Madison, *Religious Assessments*]).

2. JOHN RAWLS, *POLITICAL LIBERALISM* 11-15 (1996) [hereinafter RAWLS, *POLITICAL LIBERALISM*] (briefly describing the ideal of political justice).

3. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

in a just society and defending a conception of justice as “political.”⁴ From that perspective it seems clear that religion in the United States and elsewhere has often had an undue influence on governmental policies, intruding on citizens’ liberty of conscience and impeding the realization of a common, shared conception of justice.⁵ This undue influence is arguably exemplified by a Governor who has presidential ambitions and who uses the resources of his office to sponsor a call for prayer at which he invokes the help of Jesus Christ to solve grave financial and economic problems confronting America in the summer of 2011.⁶ Undoubtedly such influence has been considerably moderated in modern times by widespread recognition of the individual right to liberty of conscience and the freedom to exercise religious choice,⁷ with the same freedom for “those who believe in no religion at all.”⁸ But even in a constitutional democracy, like that of the United States, where a Constitution guarantees the non-establishment and free exercise of religion,⁹ there is a recurring need to examine our practices and revisit court decisions governing religious symbolism and religious language in the public sphere. Accordingly, in this Article I wish to revisit certain decisions of the Supreme Court of the United States on the constitutionality of placing small replicas or huge monuments of the Ten Commandments in public places as well as the use of the words “under God” in the Pledge of Allegiance’s reference to “one Nation, under God.”

Before turning to those decisions, Part I first lays out several models of the church-state relationship that lawyers and philosophers have defended in recent years. In general, the church-state relationship has been defined in terms of the degree to which the state is either *identified* with religion or *separated* from it.¹⁰ Using this criterion, we could distinguish several versions of state establishments of religion as well as various kinds of state separations from religion. Of course, cultural practices can to some degree explain the nature of a particular society’s church-state relationship, but in today’s world legal or constitutional provisions are more often than not the

4. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 11-15.

5. See THE POWER OF RELIGION IN THE PUBLIC SPHERE 2 (Eduardo Mendieta & Jonathan Vanantwerpen eds., 2011).

6. See Manny Fernandez, *Perry Leads Prayer Rally for ‘Nation in Crisis’*, N.Y. TIMES, August 6, 2011, at 1.

7. For an excellent discussion of religious equality in American history, see generally MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008).

8. *McCreary*, 545 U.S. at 884 (O’Connor, J., concurring).

9. U.S. CONST. amend. I.

10. See *infra* Part I.C.

formal mechanisms for entrenching the structures of the relationship, defining the scope of the identity or separation of church and state.¹¹

Some contemporary models are opposed to the separation metaphor on the ground that “separation” is at best a very partial description of the church-state connection and unable to account for the many situations where the state *already* treats religion in ways that are *equal* to the way non-religious entities are treated. In such contexts, “separation” seems to be an incomplete and misleading label to describe the core of the church-state relationship.¹² Still, from a quite different perspective, a powerful argument has been mounted in favor of a strong sense of separation based on ethical norms of individual autonomy and personal responsibility, which are inconsistent with attempts by states to identify themselves *and* its citizens with a religion or, for that matter, non-religion.¹³ According to this model, among a person’s ethical responsibilities is the duty to make one’s *own* decisions about what kind of life is a good one to lead and what, if any, religious beliefs to adhere to.¹⁴ It follows that we must above all avoid *subordinating* our decisional responsibility to the state while opposing its collective determination of values for the entire society.

Parts II and III assess how these and other models apply to selected Establishment Clause cases. Part II analyzes conflicting Supreme Court cases on the propriety of state action in placing representations of the Ten Commandments in public buildings, such as county courthouses, or on public property, such as the grounds of a state capitol. Part III turns to the controversy over the Pledge of Allegiance’s use of the words “under God” and whether and how those words are constitutionally permissible or in violation of the Establishment Clause.

Much of the critical focus in Parts II and III is trained on the way in which the Court has interpreted religious words and phrases found in our past history which allegedly support religious language in contemporary patriotic recitals, as well as how the Court has used historical events to help explain and establish the propriety and constitutionality of religious symbols on public property. The Article argues that the Court, in the cases under review, has given history, in general, and past Presidential Proclamations, in

11. For further discussion of degrees of separation and identity, see George Ryskamp, *The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty*, 1980 BYU L. REV. 616 (1980). See also W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 12 (Johan D. van der Vyver & John Witte, Jr., eds., 1996).

12. See *infra* Part I.C.

13. See *infra* Part I.B.

14. See *infra* Part I.B.

particular, an extraordinary authority in contemporary circumstances that is misplaced and mistaken; that reliance on historical events such as Presidents' statements in proclamations about a religious holiday or the reasons for revising the wording of the Pledge of Allegiance is neither persuasive nor a valid basis for arguments against claims raising Establishment Clause violations. It further argues that the social meaning of religious language or symbolism in public settings generally involves a form of disparagement and disrespect for outliers—members of other or minority religions, and those who believe in no religion.

II. VARIATIONS ON THE THEME OF SEPARATION OF CHURCH AND STATE

As stated above, America's church-state problem is part of a broader controversy over how to reconcile a plurality of moral, philosophical and religious doctrines with a single conception of justice.¹⁵ In this Part the focus is on a subset of that broader controversy as we examine competing proposals for clarifying and assessing the meaning and adequacy of the separation of church and state doctrine, which has been a dominant albeit controversial understanding of the church-state relationship in American constitutional law.¹⁶

A central question in this Part is whether major constitutional values, such as equality and liberty of conscience, are better able to throw light on how to conceive of the church-state relationship, minimizing and qualifying the "separation" paradigm. This is not to suggest that there is no validity in the idea of a "wall of separation" between church and state that Thomas Jefferson made famous,¹⁷ for there are important ways in which church and state are and must be kept separate. I will suggest, however, that other values must be taken into account in order to represent a more accurate picture of the church-state relationship.

One valid sense of separation seems to be captured in John Rawls's claim that the Supreme Court, as an exemplar of public reason, should routinely exclude religious views from entering into the basis of its decisions.¹⁸ For Rawls, the ideal of public reason means that:

15. RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 3-28.

16. For a comprehensive review and criticism of the separation of church and state doctrine, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

17. See THOMAS JEFFERSON, *To Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association in the State of Connecticut, January 1, 1802*, in THOMAS JEFFERSON: *WRITINGS* 510 (Merrill D. Peterson ed., 1984).

18. RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 231.

citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably to endorse.¹⁹

Rawls calls this the “idea of reciprocity,”²⁰ which encourages each citizen to put into practice this reciprocal reliance on “public reasons” when addressing one another on matters of public concern.²¹

Supreme Court opinions have in fact exemplified Rawls’s idea by holding that laws may not be based on expressly religious sources or arguments, which many citizens would not be able to accept or endorse because they are committed to contrary beliefs or no beliefs. In 1987, to take one example, the Court held that a Louisiana statute providing for the teaching of “creation science” in public schools was unconstitutional because it advanced the religious belief that a supernatural being created humankind.²² Some people may wonder whether there were “public” reasons that could have supported the teaching of creation science. The answer seems to be that “creation” expresses a quintessentially religious idea that is impossible to translate into reasons that all citizens can share, thus failing the test of reciprocity.²³ Similarly, in 2005, a school district in Dover, Pennsylvania did make an attempt to translate creation science into the idea of “intelligent design,” but after a long trial a federal judge found the school’s policy incompatible with the First Amendment’s Establishment Clause.²⁴ As we shall see, such cases, while upholding the separation of church and state, do not provide a rationale for a comprehensive understanding of the church-state relationship.²⁵

Still, as already noted, there is a powerful argument for separation of church and state, discussed below, that focuses on how ethical theory—faced with a choice between a secular state that is tolerant of religion and a religious state that tolerates those who have no religious belief—*requires*

19. *Id.* at 1. See also JOHN RAWLS, *The Idea of Public Reason Revisited*, in JOHN RAWLS, COLLECTED PAPERS 573 (Samuel Freeman ed., 1999).

20. RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 49-50.

21. *Id.*

22. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

23. See *id.*; *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (striking down an Arkansas law that made it unlawful to teach evolution because of evolution’s conflict with the Biblical account of human origins); see also RAWLS, POLITICAL LIBERALISM, *supra* note 2, at 49-50.

24. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (2005). For an extended discussion of the trial, see Margaret Talbot, *Darwin in the Dock*, THE NEW YORKER, Dec. 5, 2005, at 66.

25. See *infra* Part III.B.

the choice of a secular state.²⁶ But it remains to be seen whether a secular state, which unequivocally separates itself from religion, is able to “accommodate” religion in pertinent ways?²⁷ These and other issues will be addressed in the course of sketching several models of the church-state relationship, models that derive not from judicial decisions but from scholars in philosophy and law.²⁸

The two traditional models mentioned earlier are now perceived by many as the *least* desirable ways to structure the church-state relationship, perhaps especially in the United States.²⁹ One endorses the *establishment of an official state religion* that would forbid, in its most extreme version, all religions but the favored one.³⁰ This would be tantamount to a strong “union” of church and state with no discernible separation between them.³¹ In the United States, a proposal for such a union would surely require a constitutional amendment repealing the First Amendment Religion Clauses,³² which would be difficult to achieve under our present Constitution.³³ Some Muslim countries, however, do seem to have a robust *established* religion to the extent that their constitutions recognize Islam and the Qu’ran as the major or unique sources of their laws and judicial practices.³⁴ By contrast, England has a fairly weak establishment that is compatible with the rights of other religions.³⁵ In the United States, few people take seriously the idea of an established religion, perhaps because it would create even more divisiveness than what we now have, as well as

26. See *infra* Part I.B.

27. For a defense of the idea of accommodation of religion, see Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985) [hereinafter McConnell, *Accommodation* (1985)]. See also Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685 (1992). For arguments against accommodation, see Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990) [hereinafter Gey, *Why is Religion Special*].

28. See *infra* Part I.A–E.

29. See *supra* Part I.

30. See *infra* Part I.B.

31. See *infra* Part I.B.

32. See generally Charles A. Kelbley, *Panel I: The Constitutional Essentials of Political Liberalism: Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 FORDHAM L. REV. 1487 (2004).

33. The U.S. Constitution’s Article V requires amendment proposals to be supported by two-thirds of each house of Congress and three-fourths of state legislatures. U.S. CONST. art. V. I say “our present” constitution because there are many Americans who think we need to change the Constitution and remove many structural defects to make it genuinely democratic. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG AND HOW WE THE PEOPLE CAN CORRECT IT* (2006).

34. See generally REZA ASIAN, *NO GOD BUT GOD: THE ORIGINS, EVOLUTION, AND FUTURE OF ISLAM* (2005).

35. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2115 (2003).

renew the arguments that led to the framing of the First Amendment which forbids laws “respecting an establishment of religion”³⁶

To be sure, there is now some support, even within the Supreme Court of the United States, for the right of individual *states* to establish a religion within their borders.³⁷ Justice Clarence Thomas has claimed that the First Amendment’s Establishment Clause forbidding a national religion does not apply to the states which, he claims, are free to establish *state* religions.³⁸ But in view of our legal history and countless Supreme Court decisions that require the states to abide by the Establishment Clause, that understanding of states’ rights will likely remain a minority position.³⁹

In sharp contrast to an official established church is an extreme version of “secularism” that contends religion should have no authority in matters concerned with our collective or individual lives.⁴⁰ While not formally atheistic, this extreme secularism, which appeared in America in the late nineteenth and mid-twentieth centuries, rejects religion and recommends exclusive reliance on science and reason.⁴¹ Secularism was an underlying issue in the famous 1925 “Scopes Monkey Trial,” wherein Clarence Darrow opposed Tennessee’s prosecution of a biology teacher who taught evolution in his high school class.⁴² A similar form of secularism is apparent in contemporary practices in France, where, since 1905, the laws have relegated religion to a position having no influence on public values because it seemed it was not recognized as a source of values in the first place.⁴³

36. U.S. CONST. amend. I. For contrasting views on Christianity as a developing or de facto established religion in America, see generally MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM (2006); see also GREGORY A. BOYD, THE MYTH OF A CHRISTIAN NATION: HOW THE QUEST FOR POLITICAL POWER IS DESTROYING THE CHURCH (2005).

37. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 49-54 (2004) (Thomas, J., concurring).

38. *Id.* But see *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 301 (2000) (prohibition of establishment applies to “the States and their political subdivisions”). For relevant commentary, see NUSSBAUM, *supra* note 7, at 6-7, 75, 105-108, 134, 232, 266.

39. But see Kelbley, *supra* note 32, at 1495-96.

40. See FELDMAN, *infra* note 43, at 236.

41. See FELDMAN, *infra* note 43, at 115, 236. For a useful discussion of the varieties of secularism, especially for the distinction between “passive secularism” and “assertive secularism,” see AHMET T. KURU, SECULARISM AND STATE POLICIES TOWARD RELIGION: THE UNITED STATES, FRANCE, AND TURKEY 6-74, 103-36 (2009).

42. For an excellent account of the case and the issues, see EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA’S CONTINUING DEBATE OVER SCIENCE AND RELIGION (2006).

43. For discussion of French secularism, see, e.g., *100th Anniversary of Secularism in France*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, available at <http://pewforum.org/docs/?DocID=129>; see also NOAH FELDMAN, DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 236 (2005); NUSSBAUM, *supra* note 7, at 83, 225 (France has, in effect, a “secular establishment”); Rachel Donadio & Alan Cowell, *Pope Addresses Secularism in France*, N.Y. TIMES, Sept. 12, 2008, available at www.nytimes.com/2008/09/12/world/europe/12iht-13pope.16103201.html.

A. Feldman: Legal Secularism and Values Evangelicalism

Other models of the church-state relationship fall somewhere between state establishment and extreme secularism, including moderate versions of separation of church and state, which is what we find in Noah Feldman's *Divided By God*.⁴⁴ After tracing the history of church-state relations in America through several stages from the founding to the present, Feldman sees the current situation in terms of an opposition between "legal secularism" and "values evangelicalism."⁴⁵ His solution involves the need for each side to surrender some portion of their positions in order to promote the reconciliation that he thinks benefits both.⁴⁶ Before considering his proposal, we need to have a better idea of what legal secularism and values evangelicalism stand for.⁴⁷

Legal secularism is far more moderate than the "assertive" or extreme secularism that I described above. According to Feldman, advocates of legal secularism view religion in terms of personal beliefs and choices that have little or nothing to do with government; they fear that religious values will tend to divide us and thus recommend that governments should simply be made secular by law.⁴⁸ In their view, if a government were to consider adopting religious values, it would probably choose those favored by the majority or a dominant political party, which would hardly be fair to religious minorities and nonreligious people.⁴⁹ Feldman's characterization of legal secularism is, at least on the surface, similar to some of Rawls's ideas.⁵⁰ However, there are important differences that I will discuss below. For now, it suffices to say that "secularism," according to Rawls, is not an ingredient in his political understanding of justice.⁵¹

"Values evangelicalism" is the other side of the dominant church-state divide that Feldman sees in contemporary American culture.⁵² But the term may seem narrower than it actually is, for to say that it refers to those who believe in the relevance of religious values in political life is to erect a tent

44. FELDMAN, *supra* note 43.

45. *Id.* at 220-34.

46. *Id.* at 236-37.

47. For an examination of evangelicalism as a political presence in America, see DAVID E. FITCH, *THE END OF EVANGELICALISM? DISCERNING A NEW FAITHFULNESS FOR MISSION: TOWARDS AN EVANGELICAL POLITICAL THEOLOGY* (2011). See also SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* (2004).

48. FELDMAN, *supra* note 43, at 221-22.

49. *Id.* at 222.

50. Feldman states that in light of religious diversity and the possibility of many contradictory beliefs, Rawls's solution to the problem of using religious language in the political realm "seems like the best mechanism for keeping the conversation going." *Id.* at 223.

51. See *id.* at 222-23.

52. *Id.* at 227-28.

that accommodates a great diversity of religious and even non-religious values. Feldman notes, for example, that not all values evangelicals are in fact evangelical or born-again Christians; the category, he claims, can include “Jews, Catholics, [and] Muslims, [as well as] people who do not focus on a particular religio[n]” but focus mainly on moral values that can be shared by everyone.⁵³ What they have in common is “evangelizing *for* values,” arguing in support of ideas about how to live one’s life and lobbying the government to enact those values wherever possible.⁵⁴ For evangelicals, the unity of the United States depends on our awareness of our values and defending them.⁵⁵

One way in which values evangelicalism is radically opposed to Rawls’s political liberalism stems from its focus on moral and religious values, which is just the opposite of Rawls’s focus on political values and public reason.⁵⁶ Of course, political values and public reasons can also qualify as moral values, but in a more general sense that precludes being tied to a specific sectarian morality. But before turning to this conflict, I will first summarize the problems Feldman finds with legal secularism and values evangelicalism and then return to his solution, which—he claims—will enable us to “reconcile unity and diversity” and move us closer to constructing a single nation.⁵⁷ That reconciliation, of course, is a laudable goal, and one that Rawls and many others share.⁵⁸ The question is whether Feldman’s version of achieving unity amid diversity is more likely to succeed than Rawls’s position or other alternatives.

Just as the Darwin-inspired strong secularism of the late 19th century led to the birth of religious fundamentalism, the successes of the more moderate legal secularism in the 20th century eventually incited the angry reaction that produced a new form of fundamentalism.⁵⁹ This new religious movement “returned to the political scene carrying the banner of the Moral Majority and, later, the Christian Coalition.”⁶⁰ But in contrast to the earlier fundamentalism, the new movement advocated not a particular set of beliefs, but values that allegedly could be shared by all people of faith, which would lead to national unity.⁶¹ Feldman here may be suggesting that

53. FELDMAN, *supra* note 43, at 7.

54. *Id.*

55. *Id.* at 7-8.

56. *Id.* at 7-8, 223; *see also* Samuel Freeman, *Public Reason and Political Justifications*, 72 *FORDHAM L. REV.* 2021, 2067 (2004).

57. FELDMAN, *supra* note 43, at 251.

58. *See id.* at 222-23, 251.

59. *Id.* at 12-13.

60. *Id.* at 13.

61. *Id.* at 13-14.

the evangelical position thus fails to take into consideration Justice O'Connor's concern for "those who believe in no religion at all[,]” which she refers to in the epigraph to this Article.⁶² But the new evangelicals were not satisfied with popular politics; they “pushed for judicial appointments and, when they got them, developed their own innovative legal strategy, depicting religious people as a persecuted minority in need of the courts’ protection.”⁶³

In the last analysis, Feldman argues that values evangelicalism and legal secularism are failures because neither one is fully able to “reconcile[] religious diversity with national unity.”⁶⁴ The problem with the “shared values” approach of the evangelicals is that those values are not really shared by all people.⁶⁵ Further, if they water them down so that more people can share them, they would either not have the power to overcome disagreements or would invite moral relativism.⁶⁶ Feldman thinks the problem with legal secularism, on the other hand, is that its attempt to include all people by separating religion from government and the public sphere actually *excludes* the values evangelicals who do not want to keep religion private.⁶⁷ Thus the mistake of both sides, according to Feldman’s perspective, is that their quests for unity and inclusiveness unwittingly exclude some people.⁶⁸

Feldman’s own solution is twofold. First, he recommends a rigorous institutional separation of government from religion with no *financial* support for religious schools or other activities.⁶⁹ The reason for this separation is to prevent religious organizations from fighting for funds that would come from taxes to support their programs.⁷⁰ Currently, the government spends billions of dollars on religious schools and related programs.⁷¹ To avoid this, Feldman argues that we need to restore the

62. *McCreary*, 545 U.S. at 884 (O’Connor, J., concurring); see FELDMAN, *supra* note 43, at 13-14.

63. FELDMAN, *supra* note 43, at 13-14.

64. *Id.* at 14.

65. *Id.*

66. *Id.*

67. *See id.*

68. FELDMAN, *supra* note 43, at 14. In recent years, one strand of contemporary evangelicalism has moved in somewhat new directions. See Frances Fitzgerald, *The New Evangelicals: This election, a growing movement presents a challenge to the religious right*, THE NEW YORKER, June 30, 2008, http://www.newyorker.com/reporting/2008/06/30/080630fa_fact_fitzgerald?currentPage=all.

69. FELDMAN, *supra* note 43, at 237.

70. *See id.*, at 238.

71. See WHITE HOUSE OFFICE OF FAITH-BASED AND CMTY. INITIATIVES, GUIDANCE TO FAITH-BASED AND CMTY. ORGANIZATIONS ON PARTNERING WITH THE FED. GOV’T 2-3, available at <http://www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf> (last visited Feb. 4,

principle of the separation of church and state because government support of religion, he contends, inevitably sows the seeds of disunity and dissension, not the unity that the values evangelicals hope to achieve.⁷² As I will try to show, Feldman is at least partially right, but his “separation” thesis may be too extreme by failing to take into consideration concerns for equality that other proposals, considered below, emphasize as crucially important.

In any case, the first part of Feldman’s solution takes something away from the values evangelicals but it is a net gain for the legal secularists who have long opposed the expenditure of public resources on religion.⁷³ The second component of his solution would give something to the evangelicals and deprive the legal secularists of some of their successes in the courts over the past few decades.⁷⁴ Namely, the constitutional decisions that marginalize or ban religion from public places, including a ban on prayer in public schools, are decisions that Feldman claims have alienated millions of people within the fold of the values evangelicals.⁷⁵ Thus, the second component “allow[s] public religion where it is inclusive . . . and . . . religious displays and prayers so long as they accommodate . . . religious diversity.”⁷⁶ Feldman claims:

No one should ever be coerced into a religious exercise, but so long as no one’s rights are violated, it makes no sense to ban public religion on the theory that someone might be offended or feel excluded. This shift would symbolize a broader acceptance that religious faith does indeed inform the political choices of many Americans.⁷⁷

Yet an important question here is whether Feldman is correct in assuming that no one’s rights are violated by public religion, an issue that I will be addressing later in this Article.⁷⁸

Meanwhile, does Feldman’s proposal really solve the conflict between values evangelicalism and legal secularism? Let us assume—and this may be a questionable assumption—that evangelicals will accept the first

2012). For relevant discussion, see Cass Sunstein, *Taxpayers and Religion*, University of Chicago Law School Faculty Blog, March 14, 2007, http://uchicagolaw.typepad.com/faculty/2007/03/taxpayers_and_r.html.

72. See FELDMAN, *supra* note 43, at 238.

73. See *id.* at 221, 237-38.

74. See *id.* at 15.

75. *Id.*

76. *Id.* at 15-16.

77. FELDMAN, *supra* note 43, at 16.

78. See *infra*, Part I.C.

component of the solution: the total withdrawal of financial support of religious schools and related programs.⁷⁹ But if legal secularists, for their part, welcome that component with open arms, it is highly doubtful they would accept the second component: permitting public religious displays and prayers. Secularists would oppose such displays even when they are structured to accommodate religious diversity, assuming that is feasible.⁸⁰ For even if all religions were free to participate in public religious displays and prayers, there is simply not enough public space to accommodate all religions without turning the public political forum into a veritable circus. Moreover, the larger membership of the values evangelicals in comparison to minority religions suggests that the government's allowance of public displays would inevitably favor by default the religions that are in the majority.⁸¹ More importantly, there is a high probability that allowing religious displays and prayer in the public sphere would create even greater divisiveness and an implicit disparagement of minority religions or of those who have no belief, which Feldman does not consider. We can take up the matter in some detail in the next two Parts in the discussion of the court cases I mentioned earlier and ask whether, as a matter of principle, it is better *not* to allow public displays of religious symbols or the use of religious language in public ceremonies in order to avoid disparagement and violations of many citizens' equal liberty of conscience. But now I wish to comment on how Rawls's view of religious discourse in the public political forum relates to Feldman's endorsement of religious displays.

Rawls's understanding of the requirements of public reason became more liberal when he revised his initial statements in *Political Liberalism*; he came to approve of citizens voicing their religious convictions in public debate on political issues.⁸² This "wide view" of public reason came, however, with the "proviso" that citizens must in due course show how their religious beliefs can be understood in terms of public reasons that other citizens can share and agree on, thereby fulfilling the principle of reciprocity.⁸³ Absent this proviso, public debate risks deteriorating to the point that citizens merely confront each other with their individual religious convictions, which contribute little or nothing to reasoned discussion of

79. See FELDMAN, *supra* note 43, at 237.

80. *Id.* at 15-16.

81. A strong indication of favoritism for majority religions and monotheism is found in Justice Antonin Scalia's remarks in his dissenting opinion in one of the recent Ten Commandments cases, *McCreary*, 545 U.S. at 893 (2005) ("the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."). I discuss *McCreary* in Part II.B below.

82. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 11-15; compare with *id.* at xlix-l.

83. See *id.* at li-iii.

which public policies should be adopted. In any case, the point to note is that Rawls by no means wants to confine religious belief to citizens' personal lives in the "background culture."⁸⁴ There is a place for religion to enter politics, but with the proviso that those who invoke it must show how it strengthens public reason, something the abolitionists arguably did in the 19th century and Martin Luther King, Jr. did—along with others—during the civil rights movement in the 1960s.⁸⁵ Referring to the abolitionists and the later civil rights movement, Rawls noted that "[t]he proviso was fulfilled in their cases, however much they emphasized the religious roots of their doctrines, because these doctrines supported basic constitutional values—as they themselves asserted—and so supported reasonable conceptions of political justice."⁸⁶ In any event, all of this shows that what is involved here is not a blanket exclusion of religious arguments from public debate, but rather the need to show that when religious convictions are used to support public policies, citizens who rely on those convictions must be able to show their relevance to shared public values.⁸⁷

Feldman is aware of Rawls's earlier view according to which religious beliefs and attitudes should be *excluded* from public debate, but he does not take account of Rawls's later and more liberal "wide" view, which introduced the "proviso."⁸⁸ Although it may be doubtful whether this more liberal view of public reason is generally workable or efficacious, it certainly goes some distance toward recognizing the positive value of religious beliefs in the public forum.⁸⁹ But Feldman's proposal goes further by allowing more symbolic displays of religion in public contexts without any requirement of a showing that public reason is strengthened by sectarian religious symbolism.⁹⁰ Indeed, insofar as religious displays are not accompanied by speech, much less public reasons, they are far more likely to involve disparagement of other religions and the citizens who adhere to them. I will shortly turn to examples of controversial public displays of religious symbols and language in Part II and consider how the Supreme Court dealt with those issues. But first I want to consider some additional

84. John Rawls, *The Idea of Public Reason Revisited*, in JOHN RAWLS: COLLECTED PAPERS 573, 576 (Samuel Freeman ed., 1999) [hereinafter Rawls, *Public Reason Revisited*].

85. For an excellent study of the role of Martin Luther King, Jr., during this period and in relation to public reason, see David A. J. Richards, *Ethical Religion and the Struggle for Human Rights: The Case of Martin Luther King, Jr.*, 72 *FORDHAM L. REV.* 2105, 2106 (2004).

86. Rawls, *Public Reason Revisited*, *supra* note 84, 573, 593.

87. See generally RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at xlix-l.

88. See FELDMAN, *supra* note 43, at 222-23; see also RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at l.

89. See generally RAWLS, *supra* note 2, at xlix-l.

90. See FELDMAN, *supra* note 43, at 15-16.

models of the church-state relationship, the first of which is Ronald Dworkin's position on what that relationship should be in America.

B. Dworkin: A Religious or a Secular Nation?

Ronald Dworkin takes a more philosophical approach to the church-state relationship within a sustained reflection on the current status of democracy in America.⁹¹ Believing that there is currently an absence of genuine political argument, he first attempts to establish a plausible "common ground" with two matrix principles of human dignity that he thinks most everyone can accept.⁹² The first principle states that every human life has an equal intrinsic value and that it is extremely important that all human lives succeed and realize their potential.⁹³ Dworkin states that if the objective importance of a human life "cannot be thought to belong to any human life without belonging equally to all, then it is impossible to separate self-respect from respect for the importance of the lives of others."⁹⁴ As such, "[y]ou cannot act in a way that denies the intrinsic importance of any human life without an insult to your own dignity."⁹⁵

From this Kantian-like idea it follows that we must often decide when our actions and policies do show contempt for the intrinsic importance of other people's lives.⁹⁶ This is a principal concern as Dworkin proceeds to assess the impact of this principle on a number of divisive political issues that are now on the political agenda, including "religion and dignity."⁹⁷

Dworkin's "second principle of human dignity . . . insists that each of us has a personal responsibility for the governance of his own life that includes the responsibility to make and execute ultimate decisions about what life would be a good one to lead."⁹⁸ In particular, it means that all persons have an obligation to choose ethical values for themselves, avoiding subordination to others.⁹⁹ Although our culture and other people will

91. See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 62-63 (2006).

92. See *id.* at 6.

93. *Id.* at 9.

94. *Id.* at 16.

95. *Id.*

96. See generally IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 12-13 (Mary Gregor ed., trans., 1997); see also KANT'S GROUNDWORK OF THE METAPHYSICS OF MORALS xxv (Paul Guyer ed., 1998).

97. See DWORKIN, *supra* note 91, at 52-57. The other issues Dworkin deals with in terms of the two principles of dignity include human rights and terrorism, taxes and fairness, and the nature of democracy itself. See *id.* at viii., ch. 2, ch. 3, ch. 4, ch. 5.

98. *Id.* at 17.

99. See *id.*

inevitably influence us in many ways, “we must not accept the right of anyone else to force us to conform to a view of success that but for that coercion we would not choose.”¹⁰⁰ Here, it is important to note that the scope of this personal responsibility is limited to our *ethical* convictions but does not apply to our *moral* principles.¹⁰¹ In this way, Dworkin makes a distinction between ethics and morality, describing the difference as follows:

Our ethical convictions define what we should count as a good life for ourselves; our moral principles define our obligations and responsibilities to other people. The principle of personal responsibility allows the state to force us to live in accordance with collective decisions of moral principle, but it forbids the state to dictate ethical convictions in that way.¹⁰²

Having outlined the two principles of dignity as a common ground for argument and debate, Dworkin then assesses how they might apply to issues of terrorism, religion, taxes, and the possibility of democracy itself.¹⁰³ The principle of personal responsibility is quite important for Dworkin’s discussion of religion and dignity and his proposal for structuring the church-state relationship, which differs markedly from Feldman’s.¹⁰⁴ But both principles are germane to each of the issues he explores, as well as to many topics that are beyond the scope of his book.

In applying his two principles to religion, Dworkin distinguishes two “ideal types” for understanding the church-state relationship.¹⁰⁵ Like Justice O’Connor, he says that “Americans agree on one crucially important principle: our government must be tolerant of all peaceful religious faiths and also of people of no faith.”¹⁰⁶ But his question concerns the base from which our tolerance should spring. He asks: “Should we be a religious nation, collectively committed to the values of faith and worship, but with tolerance for religious minorities including nonbelievers? Or should we be a nation committed to thoroughly secular government but with tolerance and accommodation for people of religious faith?”¹⁰⁷ The choice is thus between a religious nation tolerating nonbelief and a secular nation

100. *Id.*

101. DWORKIN, *supra* note 91, at 21.

102. *Id.*

103. *See id.* at viii., ch. 2, ch. 3, ch. 4, ch. 5.

104. *See id.* at 17-21; *see also* FELDMAN, *supra* note 43, at 50.

105. DWORKIN, *supra* note 91, at 56.

106. *Id.*; *see McCreary*, 545 U.S. at 884 (O’Connor, J., concurring).

107. DWORKIN, *supra* note 91, at 56.

tolerating religion.¹⁰⁸ So stated, the alternatives might appear to be equally attractive ways to structure our government in relation to religion with no downside, given that there is tolerance on both sides for difference—tolerance for nonbelief in the religious model, and tolerance for belief in the secular model.¹⁰⁹

Should we therefore flip a coin to choose between them? For Dworkin, that would be a huge mistake: he thinks there are powerful reasons supporting the choice of the secular nation model.¹¹⁰ In making that choice, he relies on both principles of dignity, but perhaps somewhat more on the principle of personal responsibility, which emphasizes the liberty to make personal decisions about how to lead one's life in a way that fulfills the "intrinsic value" of life according to individual conceptions of the good.¹¹¹ There are, of course, legitimate restraints on a person's liberty, such as laws that fairly distribute the burdens of taxation and the like.¹¹² And there are what Dworkin calls "impersonally judgmental justifications" for restricting freedom, that is, judgments that "appeal to the intrinsic value of some impersonal object[.]" such as natural or artistic treasures.¹¹³ Such judgments impose legitimate restraints on our liberty by laying down moral principles that bind us all.¹¹⁴ On the other hand, what the principle of personal responsibility opposes are "personally judgmental" justifications for restricting liberty, which do not express legitimate *moral* principles that bind us all, but wrongly dictate what lives are worthy ways to fulfill the intrinsic value of life.¹¹⁵ In short, decisions about "worthy lives" are the proper concern of an individual's *ethics*, not the business of the state. Thus the second principle "insists only that people have responsibility for their *own* ethical values, that is, their *own* convictions about why their life has intrinsic importance and what kind of life would best realize that value for them."¹¹⁶

The foregoing comprises the reasons why Dworkin supports the model of a secular nation that tolerates religion. Perhaps his central claim is this: "our collective religious culture should be created not through the collective power of the state but organically, through the separate acts of conviction,

108. *See id.*

109. *See id.* at 56-57.

110. *See id.* at 66-67.

111. *Id.* at 70-71.

112. *See* DWORKIN, *supra* note 91, at 70.

113. *Id.* at 71.

114. *See id.*

115. *See id.* at 72-73.

116. *Id.* at 71 (emphasis added).

commitment, and faith of people drawn to such acts.”¹¹⁷ James Madison made a similar point in 1785 in his famous “Memorial and Remonstrance Against Religious Assessments,”¹¹⁸ arguing forcefully against Patrick Henry’s proposal to assess a tax on Virginia citizens for the support of “Teachers of Christian Religion.”¹¹⁹ Madison wrote:

[W]e hold it for a fundamental and undeniable truth, “that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.¹²⁰

It seems difficult to counter the arguments that Dworkin and Madison make for the decisive importance of “the separate acts of conviction, commitment and faith” of individuals, as over against the “collective power of the state.”¹²¹ But as noted earlier, Dworkin’s second principle does recognize the inevitable influence of culture on persons’ choices. In any case, it seems clear that Dworkin’s central claims are compatible with the spirit of Madison’s “Remonstrance.”¹²² Thus, Dworkin’s second principle:

forbids my accepting that other people have the right to dictate what I am to think about what makes a good life or to forbid me to act as I wish because they think my ethical values are wrong. It therefore forbids me to accept any manipulation of my culture that is both collective and deliberate—that deploys the collective power and treasure of the community as a whole and that aims to affect the ethical choices and values of its members. That is subordination.¹²³

This is certainly a persuasive argument against subordination and a formidable critique of establishment. For many Americans, Dworkin’s model of a secular nation tolerating religion will be seen as largely implicit

117. DWORKIN, *supra* note 91, at 75.

118. Madison, *Religious Assessments*, *supra* note 1, at 183.

119. Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion*, Virginia House of Delegates (December 24, 1784).

120. Madison, *Religious Assessments*, *supra* note 1, at 183 (responding to the Bill Establishing a Provision for Teachers of the Christian Religion).

121. DWORKIN, *supra* note 91, at 75; see Madison, *Religious Assessments*, *supra* note 1, at 183.

122. See DWORKIN, *supra* note 91, at 76; see Madison, *Religious Assessments*, *supra* note 1, at 183.

123. DWORKIN, *supra* note 91, at 17, 75.

in our constitutional culture's interpretation of the Establishment Clause.¹²⁴ His second principle of dignity, which emphasizes the importance of personal responsibility, makes religion a matter of individual ethical choice based on conviction.¹²⁵ In that way, religion is not a concern of political justice, except to the extent that the state must protect citizens' liberty of conscience that they need in order to have convictions and exercise personal responsibility.¹²⁶ To be sure, Dworkin has difficulties with Rawls's idea of public reason,¹²⁷ but in other respects he has expressed great admiration for Rawls's theories of justice.¹²⁸ In any event, it seems clear that Dworkin's argument provides a cogent rationale for the separation of church and state, not only on historical and constitutional grounds, but more fundamentally on ethical grounds that demand respect for individual autonomy while criticizing "subordination" to the state and all attempts to enact the collective determination of the religious life of citizens.¹²⁹ In this respect, his argument has obvious and important links to both the Free Exercise and Establishment Clauses.¹³⁰ It will be instructive to compare the relationship between Dworkin's "secular nation" position with the "equal liberty" model that Christopher Eisgruber and Lawrence Sager argue for in *Religious Freedom and the Constitution*, to which I now turn.¹³¹

C. Eisgruber and Sager: Separation and Equal Liberty

One of the most enduring metaphors in constitutional law is the "wall of separation" between church and state, made famous by Thomas Jefferson in a letter to a group of Danbury Baptists in 1802.¹³² Although neither Feldman nor Dworkin rely exclusively on the separation metaphor in their treatment of the church-state relationship, one can nevertheless recognize some sense of "separation" in their respective views on the church-state connection.¹³³ Feldman's proposal to deprive religions of all financial

124. See U.S. CONST. amend. I.

125. DWORKIN, *supra* note 91, at 17-76.

126. *Id.* at 76-78.

127. See, e.g., Ronald Dworkin, Keynote Address at the Fordham University School of Law Conference: Rawls and the Law, 72 *FORDHAM L. REV.* 1387, 1397-99 (2004).

128. *Id.* at 1388-92.

129. See DWORKIN, *supra* note 91, at 62, 57, 76.

130. See *id.* at 57; see also U.S. CONST. amend. I.

131. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 52 (2007); see also DWORKIN, *supra* note 91, at 57.

132. Letter from Thomas Jefferson, President of the United States, to the Danbury Baptists (Jan. 1, 1802) (on file with the Library of Congress). See also Daniel L. Dreisbach, "Sowing Useful Truths and Principles": The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation," 39 *J. CHURCH & ST.* 455, 469 (1997).

133. See FELDMAN, *supra* note 43, at 244-50; see also DWORKIN, *supra* note 91, at 58.

support obviously assumes a sharp line between church and state, and Dworkin's preference for a tolerant secular state could be read as a partial endorsement of the "wall of separation" that is needed to protect citizens' ethical values from the collective power of a tolerant religious state.¹³⁴

By contrast, the approach of Eisgruber and Sager to religious freedom builds on the contrast between conventional conceptions of the separation of church and state, on the one hand, and what they call an "equal liberty" understanding of the Constitution's religion clauses, on the other.¹³⁵ Indeed, they favor the "equal liberty" model and severely criticize the "wall of separation" metaphor because it is unworkable and inconsistent with how our courts and government actually *do* treat religion, not as separate from, but as deserving equal treatment from the state.¹³⁶ They thus advocate their "equal liberty" model as the better approach to the religion clauses.¹³⁷ How do they do this? What supports it? And is their view a total rejection of the separation of church and state?

No reasonable view of the church-state relationship, at least in America, can totally renounce the separation of church and state, and Eisgruber's and Sager's position is no exception. They recognize the salience of separation in several respects, the most important being the Establishment Clause's prohibition of a national religion, a "Church of the United States" or a "Church of Texas" or any other state.¹³⁸ This seems to be an indelible mark of separation, something no plausible theory of church and state in the United States can deny. Second, they recognize that "the separation metaphor has also served as a marker for a related but more general and more useful principle—namely the idea that no particular denomination or sect ought to be the special favorite of the state."¹³⁹ They view that principle as a premise of equality, one example of how separation is not an isolated value but compatible with equal treatment of religions.¹⁴⁰ In addition, they say, the separation metaphor also

expresses two different ideals associated with religious freedom—first, that individuals and churches should be free to pursue their theological convictions and practices without undue interference from the state; and second, that citizens and public officials should be able to conduct politics without inappropriate interventions by

134. See FELDMAN, *supra* note 43, at 247; see also DWORKIN, *supra* note 91, at 63-65.

135. EISGRUBER & SAGER, *supra* note 131, at 52.

136. *Id.* at 54-56.

137. See *id.* at 58.

138. *Id.* at 7.

139. *Id.*

140. EISGRUBER & SAGER, *supra* note 131, at 7.

religious institutions and groups. In this double sense, the sphere of church-related activities should be “separate” from the state and its legitimate concerns.¹⁴¹

Here we might note in passing that these ideals of religious freedom correspond to Rawls’s views on the freestanding nature of justice and its legitimate concerns, which are “separate” from the diversity of comprehensive doctrines in the background culture of civil society.¹⁴² It is also noteworthy that each of the features of separation that Eisgruber and Sager acknowledge—no national church, no favoritism toward one church or sect, no undue state interference with free exercise of belief by individuals and churches, and no inappropriate interventions by religious institutions and groups in citizens’ and public officials’ political activity—would seem to be compatible with Dworkin’s model of a tolerant secular state.¹⁴³

In light of these several respects in which separation is clearly a part of Eisgruber’s and Sager’s view of religious liberty, it may seem surprising that they adamantly reject the separation metaphor in most other respects. But when it comes to the hard work that must be done in deciding, for example, what constitutes “undue interference” from the state, “inappropriate interventions” by religions into politics, and the “legitimate concerns” of the state, they do find the separation metaphor inadequate.¹⁴⁴ It is in cases that raise such questions that the separation metaphor may often break down and reveal its inappropriateness as the unique model for church-state relations.¹⁴⁵

Consider now a court decision that supports their thesis by bringing into question a central premise of the separation model: that the state should do nothing to “aid or hinder” religion.¹⁴⁶ As Eisgruber and Sager note,

to make sense of the idea of separation and its wall, judges and scholars have typically begun their analysis with the idea that religion should be treated as beyond the reach of the state. From this idea of leaving religion alone, it follows that government should neither benefit religion nor interfere with it. If government either aids or hinders religious organizations, persons, or practices,

141. *Id.* at 23.

142. *See, e.g.*, RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 1-1iii.

143. EISGRUBER & SAGER, *supra* note 131, at 52-57, 62; *see* DWORKIN, *supra* note 91, at 58, 66.

144. EISGRUBER & SAGER, *supra* note 131, at 23.

145. *See id.* at 24.

146. *Id.*

then it has breached the “wall of separation” and violated the Constitution.¹⁴⁷

It is *this* conception of separation that Eisgruber and Sager reject.

The issue of doing nothing to “aid or hinder” religion arose in 1947 in the first modern Establishment Clause case, *Everson v. Board of Education*.¹⁴⁸ The issue in *Everson* was whether a New Jersey law violated the Establishment Clause by authorizing local school districts to compensate parents for the cost of public transportation not only to public schools but to parochial Catholic schools as well.¹⁴⁹ By including religious schools in the program, the state was said to be aiding religion, breaching the wall separating church and state.¹⁵⁰ Writing for the Court, Justice Hugo Black strongly affirmed the separation of church and state, so much so that it appeared almost certain that he would strike down the New Jersey statute on that ground alone.¹⁵¹ But in the end, Black’s opinion emphasized that providing some government benefits to religion was plainly *not* unconstitutional.¹⁵² He said that providing churches with services like sewage disposal and fire and police protections were uncontroversial and in no way unconstitutional.¹⁵³ By parallel reasoning, compensating parents of parochial school students for the costs they incurred for public

147. *Id.* at 23-24.

148. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). As Feldman notes, prior to *Everson v. Board of Education*, the Court had discussed the importance of separation of church and state “just once in more than 150 years of . . . [c]ourt opinions . . .” FELDMAN, *supra* note 43, at 173. The case he refers to is the famous Mormon polygamy decision in *Reynolds v. United States*. *Id.* at 173 n.45 (citing *Reynolds v. United States*, 98 U.S. 145 (1878)). For Feldman’s discussion of *Everson v. Board of Education*, see FELDMAN, *supra* note 43 at 170-174.

149. *Everson*, 330 U.S. at 3-5.

150. *Id.* at 1, 5, 18.

151. Justice Black’s famous recital of what the Establishment Clause requires is as follows:

The “establishment of religion” clause . . . means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and state.”

Id. at 15-16 (quoting *Reynolds*, 98 U.S. at 164) (emphasis in original omitted).

152. *Id.* at 1, 17-18.

153. *Id.* at 17-18.

transportation to and from their schools was a function of a similar secular goal, such as safety¹⁵⁴ Yet as Eisgruber and Sager observe,

it made little sense to ask whether New Jersey's subsidy paid for transportation or aided religion. It obviously did both. The real question in *Everson*—and in every Establishment Clause case that followed it—was not whether religion had been aided, but whether it had been aided in impermissible fashion. The clumsy metaphor of “separation” obscured rather than clarified that question.¹⁵⁵

In short, by upholding the constitutionality of compensating parents of public *and* parochial school students for the cost of public transportation, the state was simply treating all parents *equally*, with the result that the separation of church and state was not a relevant principle *in this context*, although “equal liberty” certainly was.¹⁵⁶

Eisgruber and Sager examine many other cases to support their claim that the “equal liberty” model they propose makes far better sense than the crude metaphor of the wall of separation. Their claim is that there are “numerous ways in which the enterprises of the state and the enterprises of the church are bound to intersect with and affect each other. But the point should be clear. Church and state are not separate in the United States, and they cannot possibly be separate.”¹⁵⁷ And yet, as I noted above, like Feldman and Dworkin, there are important ways in which Eisgruber and Sager recognize an undeniable sense of separation of church and state in America. But separation is not the *key* to all of the major aspects of the church-state relationship.¹⁵⁸

154. *Everson*, 330 U.S. at 18.

155. EISGRUBER & SAGER, *supra* note 131, at 31. It should be noted in passing that the *Everson* Court was sharply divided, 5 to 4, with Justices Jackson and Rutledge both filing strong dissenting opinions. See *id.* at 28 (Rutledge, J., dissenting); *Everson*, 330 U.S. at 18 (Jackson, J., dissenting).

156. EISGRUBER & SAGER, *supra* note 131, at 18-19, 30-31 (2007).

157. *Id.* at 6-7.

158. For critical evaluation of the equality model, see the following articles reviewing Eisgruber and Sager's book, *Religious Freedom and the Constitution*: Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEX. L. REV. 1185, 1188 (2007); Kent Greenawalt, *How Does “Equal Liberty” Fare in Relation to Other Approaches to the Religion Clauses?*, 85 TEX. L. REV. 1217, 1217-18 (2007); Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247, 1248-50 (2007). For Eisgruber and Sager's reply, see Christopher L. Eisgruber & Lawrence G. Sager, *Chips Off Our Block? A Reply to Berg, Greenawalt, Lupu and Tuttle*, 85 TEX. L. REV. 1273, 1273 (2007).

D. Nussbaum: Liberty of Conscience

Liberty of conscience is arguably implicit in the idea of free exercise of religion, at least if we assume that religious conduct and religious beliefs are based on inner convictions, so that what is done or believed—if truly religious—is freely done or believed. The fact that religious activity was singled out for protection in the very first amendment in the Bill of Rights suggests that the founders considered religion to be special and in need of protection.¹⁵⁹ Indeed, many of the early Americans came to this country because liberty of conscience and free exercise of religion were not protected or respected in their countries of origin.¹⁶⁰ Whatever liberty of conscience may have meant in the past, today our response to other people's liberty of conscience arguably involves more than mere tolerance; it is also a matter of *respect* for individuals' religious beliefs; and because there is inevitably a diversity of beliefs about religion, it requires an *equal* respect.¹⁶¹ This seems to follow as a fair reading of the Free Exercise Clause.

All of these issues are taken up in Martha Nussbaum's fine book, *Liberty of Conscience*.¹⁶² In many respects, her discussion is in broad agreement with the positions that Dworkin and Eisgruber and Sager develop, but somewhat less so with Feldman's. Dworkin's emphasis on fairness and universal principles of human dignity forming a "common ground" for debating issues of public concern, as well as the idea of "equal respect" that he draws from those principles, closely correspond to themes that are important to Nussbaum's model of how religion should be understood and treated in a constitutional democracy such as our own.¹⁶³ But Dworkin's book—an examination and critique of the status and strength of democracy in our time, particularly in the United States—deals with religion in just one chapter, whereas Nussbaum's is concerned with religion throughout her book.¹⁶⁴ The same is true of Eisgruber and Sager's work, which, like Nussbaum's, places great emphasis on equality in the treatment

159. See McConnell, *Accommodation* (1985), *supra* note 27, at 10 (arguing that religion is protected in a manner different from all other beliefs); Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407, 411-10 (1996) (acknowledging the important protections given to religion by the Constitution but discussing to what extent that protection extends). *But see* Gey, *Why is Religion Special*, *supra* note 27, at 147-50 (arguing that religious expressions were not intended to have any greater protection than nonreligious expressions).

160. See NUSSBAUM, *supra* note 7, at 34-36 (2008).

161. See *id.* at 354-60.

162. See generally *id.*

163. See DWORKIN, *supra* note 91, at 10-11, 22; see also NUSSBAUM, *supra* note 7, at 359-60.

164. See DWORKIN, *supra* note 91, at 127-31, 52-89; see generally NUSSBAUM, *supra* note 7.

of religion while criticizing the model of separation.¹⁶⁵ Their similar concerns for equality, along with their respective critiques of separation, represent what their books have most in common. On the other hand, as we've seen, Feldman supports the idea of separation as a rationale for denying public funds for religions, which may violate equality in many instances.¹⁶⁶ Similarly, the other prong of his "solution" to the church-state problem involved greater freedom for public displays of religious symbolism, which may also pose problems for achieving the social equality that Nussbaum and Eisgruber think is required in the state's treatment of religion.¹⁶⁷

In other respects, Nussbaum's book, unlike the others, discusses the diversity of religions in the United States at great length, including frequent and detailed discussion of the differences between and among Christian and Jewish denominations as well as their more dramatic differences with non-theistic and polytheistic religions, such as Hinduism, Buddhism, and Jainism.¹⁶⁸ Perhaps one of the most distinctive features of Nussbaum's work is the way she reaches far back in American history to ground the idea of equal liberty of religious conscience by devoting an entire chapter to the 17th century American writer Roger Williams. The "founder" of the colony of Rhode Island, Williams was well-known for his views on the "persecuted conscience"¹⁶⁹ in *The Bloody Tenent of Persecution*, published in England in 1644.¹⁷⁰

According to Nussbaum, Williams inaugurated an important American tradition, one distinctive feature of which "is a personal, and highly emotional, sense of the preciousness and vulnerability of each individual person's conscience, that seat of imagination, emotion, thought, and will through which each person seeks meaning in his or her own way."¹⁷¹ Each person's "striving for conscience," whether by "Protestant, Catholic, Jew, Muslim, or pagan—must be permitted to conduct it in his or her own way, without interference either from the state or from orthodox religion."¹⁷² Similar to Dworkin's remarks on "subordination," Nussbaum says "impos[ing] an orthodoxy upon the conscience is nothing less than what Williams, in a memorable and oft-repeated image, called 'Soule rape.'¹⁷³

165. See EISGRUBER & SAGER, *supra* note 131, at 5-6; see generally NUSSBAUM, *supra* note 7.

166. See FELDMAN, *supra* note 43, at 236-37, 247.

167. See *id.* at 236-37, 248.

168. See generally NUSSBAUM, *supra* note 7.

169. *Id.* at 36.

170. *Id.* For citations to Williams' work, see *id.* at 370 n.5.

171. *Id.* at 37.

172. NUSSBAUM, *supra* note 7, at 37.

173. *Id.*; see DWORKIN, *supra* note 91, at 17-18.

Nussbaum claims that Williams's position on liberty of conscience was based on philosophical considerations of impartiality and fairness,¹⁷⁴ but there is some controversy over whether those views were influenced significantly by Williams's theological and religious beliefs.¹⁷⁵ Kent Greenawalt discusses this issue in his review of Nussbaum's book, expressing not only doubt about the independence of William's views from religious foundations but also about whether he had any "significant influence in the colonies and the early republic."¹⁷⁶ Nussbaum herself, however, would seem to agree with part of that assessment when she says, "although Williams's personal influence was uneven, the general spirit of his writings became the dominant ethos of the colonies, as ideas of religious liberty and fairness gradually took hold even where Williams's name would have brought nothing but scowls."¹⁷⁷ Her comment may leave room for the claim that there was no causal connection between Williams's writings and the colonists' views a century later. In any case, whatever the outcome on this particular historical point, Greenawalt is probably correct in saying, in his conclusion to a later exchange with Nussbaum, that the "crucial concern for us now is whether we can draw from Williams reasons for supporting religious liberty and equality that *need* not depend on particular religious premises. On that point, [he thinks,] Nussbaum[] . . . gives us solid grounds for an affirmative answer."¹⁷⁸

Those "solid grounds" also lend support to Nussbaum's repeated claims that John Rawls, in the latter half of the twentieth century, carried on the tradition inaugurated by Williams in the seventeenth century.¹⁷⁹ She links central themes in both *A Theory of Justice* and *Political Liberalism* to Williams's thought.¹⁸⁰ But she notes that there is no indication that Rawls had read Williams or was consciously following his tradition, even though "Williams's ideas of conscience and impartiality are well articulated and further developed in Rawls's modern work."¹⁸¹ In short, Nussbaum's book is sprinkled with references to and endorsement of Rawls's thinking,

174. NUSSBAUM, *supra* note 7, at 40.

175. See TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 116-17 (1998). But see NUSSBAUM, *supra* note 7, at 43, 371 n.23.

176. Kent Greenawalt, *Where Shall the Preaching Stop?*, THE N.Y. REV. OF BKS., 24, 25 (May 15, 2008) (reviewing NUSSBAUM, LIBERTY OF CONSCIENCE).

177. NUSSBAUM, *supra* note 7, at 40.

178. Martha C. Nussbaum, David Little, & Kent Greenawalt, '*Liberty of Conscience*': An Exchange, THE N.Y. REV. OF BKS., June 12, 2008, at 82, available at <http://www.nybooks.com/articles/archives/2008/jun/12/liberty-of-conscience-an-exchange>. This "exchange" includes Nussbaum's response to Greenawalt's review of her book, and a reply by Greenawalt. See *id.*

179. See NUSSBAUM, *supra* note 7, at 57.

180. *Id.*

181. *Id.* at 58.

particularly to his position on equal liberty of conscience and to the substance of his idea of “public reason.”¹⁸²

E. Greenawalt: Religion and the Constitution

Kent Greenawalt is one of the most esteemed scholars among those who have written on the Constitution’s religion clauses. In recent years he has published two long volumes on religion and the constitution, one on the Free Exercise Clause¹⁸³ and the other on the Establishment Clause.¹⁸⁴ It would be futile to make an attempt here to distill the thousand pages of these two books into a useful characterization of his approach to the religion clauses, for there are far too many distinctive aspects of his comprehensive treatment of the subject. Instead, in Parts II and III I will continue to draw on his work in relation to a number of specific issues raised in the discussion of Supreme Court cases, especially those concerning the Ten Commandments and the “under God” controversies. At the same time, I will identify various ways in which his views relate to other positions on those controversies.¹⁸⁵

Finally, I note that my purpose in discussing the cases in Parts II and III is not primarily to add to the abundant legal scholarship on them, but to explore the soundness of the reasoning the cases exhibit in relation to themes discussed in Part I, including political justice, public reason, the separation of church and state, liberty of conscience, and equal liberty.

II. FINDING A PLACE FOR THE TEN COMMANDMENTS

In recent years public displays of the Ten Commandments have been the subject of lawsuits in several states, including Alabama, Texas, and Kentucky.¹⁸⁶ Displays in two of those states were the subject of separate Supreme Court decisions in 2005, which reached opposite conclusions on whether they violated the Establishment Clause.¹⁸⁷ The disparate results seemed puzzling to some court observers. On the first day of the confirmation hearings of John Roberts as Chief Justice of the U.S. Supreme Court, more than one Senator on the Senate Judiciary Committee voiced a

182. The idea of public reason is implicit in Nussbaum’s discussion of Williams and Rawls. *See id.* at 361-62.

183. KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: VOL. 1: FREE EXERCISE AND FAIRNESS* (2006) [hereinafter GREENAWALT, *FREE EXERCISE AND FAIRNESS*].

184. KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: VOL. 2: ESTABLISHMENT AND FAIRNESS* (2008) [hereinafter GREENAWALT, *ESTABLISHMENT AND FAIRNESS*].

185. *See infra* Parts II & III.

186. *See McCreary*, 545 U.S. at 851; *Van Orden v. Perry*, 545 U.S. 677, 681 (2005); *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

187. *See McCreary*, 545 U.S. at 881; *Van Orden*, 545 U.S. at 681.

complaint about the contrary holdings, which were decided by 5 to 4 votes.¹⁸⁸ Underlying the complaint was the apparent assumption that the Court should have decided the two cases in the same way.¹⁸⁹ But as we'll see, disparate facts in the two cases may have justified different outcomes. The real explanation could be the mere fact that one of the justices voted one way in the first case and another way in the second, with the other eight justices equally divided along the same lines in both cases.¹⁹⁰

Before discussing the two decisions, we might note a similar issue that arose in 2003 when Judge Roy Moore, then the Chief Justice of the Alabama Supreme Court, refused to obey a federal court order to remove a massive display of the Ten Commandments that Judge Moore had installed in his court's rotunda.¹⁹¹ Evangelicals and secularists clashed over the propriety of that display; they made arguments on the courthouse steps and on live television for and against it.¹⁹² Perhaps the importance of the issue is underscored by the fact that Noah Feldman devoted the first two pages of *Divided By God* to its significance.¹⁹³ According to Feldman, "Judge Moore had struck a vein of division that runs deep in America's history and its psyche."¹⁹⁴ This resulted in evangelicals and secularists arguing about the correct relationship between church and state, secularists invoking Madison and Jefferson, and evangelicals claiming our government was founded on Judeo-Christian values and the Bible.¹⁹⁵ But did Judge Moore fail to uphold the "wall of separation" between church and state?¹⁹⁶ The

188. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the Committee on the Judiciary*, 109th Cong. 2-3, 41, 384 (2005) (statements of Arlen Specter, Sen. from PA, John Cornyn, Sen. from TX).

189. *See id.*

190. *See infra* Part II.B.

191. Jeffrey Gettleman, *Alabama's Top Judge Defiant On Commandments' Display*, N.Y. TIMES, Aug. 21, 2003, at A1; Jeffrey Gettleman, *He'd do it Again, Says the 'Ten Commandments Judge'*, N.Y. TIMES, Nov. 13, 2003, at A18.

192. FELDMAN, *supra* note 43, at 3-4.

193. *Id.*

194. *Id.* at 4.

195. *Id.* at 3-4.

196. For a critical appraisal of the historical basis of the separation of church and state, *see* HAMBURGER, *supra* note 16, at 1-3 (arguing that the separation of church and state doctrine in constitutional law does not have historical roots in the First Amendment). For criticism of Hamburger's position, *see* GREENAWALT, *ESTABLISHMENT AND FAIRNESS*, *supra* note 184, at 42-44; Kent Greenawalt, *History as Ideology: Philip Hamburger's Separation of Church and State*, 93 CALIF. L. REV. 367, 370-71 (2005); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1667-68 (2003) (review of Hamburger's book *Separation of Church and State*). *See also* ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: A MORAL DEFENSE OF THE SECULAR STATE* 23-24 (2005) (arguing that the wall between church and state was erected by the country's founders).

federal judge who ordered the Ten Commandments monument removed certainly thought that he had.¹⁹⁷

One view of the matter may be drawn from Rawls's idea of a freestanding conception of justice, which would likely oppose the display of the Ten Commandments in public places, such as the rotunda of the Alabama Supreme Court. Rawls's argument for exclusion would likely be based on the principle that government policies must not *depend on* or appear to endorse religious views, which transgress the limits of public reason and violate the "principle of reciprocity."¹⁹⁸ It would argue that a commitment by the state to a particular comprehensive doctrine is an obvious impediment to securing a societal agreement on a political conception of justice in a polity characterized by religious and moral pluralism.¹⁹⁹ By choosing to endorse one comprehensive doctrine, the state implicitly disparages and alienates those citizens who adhere to others or to none at all.²⁰⁰

To be sure, those who oppose displays of the Ten Commandments in public places are not necessarily criticizing the Ten Commandments or those who believe in or follow the Commandments' requirements. A political conception of justice does not take sides; it carefully avoids the endorsement of positions on the *truth or falsity* of the content of comprehensive religious or moral doctrines.²⁰¹ In a diverse society with many religions and comprehensive doctrines, the government needs to treat all citizens fairly by not endorsing any positions on questions of religious belief.²⁰² No doubt many public officials fervently believe in the Ten Commandments, but in a religiously diverse society, their beliefs simply cannot be a model for all citizens, not where liberty of conscience and free exercise of religion are protected. In sum, those are among the reasons that a Rawlsian perspective would advance against public displays of the Ten Commandments. What, now, is the position of the Supreme Court?

That question was first addressed in a 1980 Supreme Court decision. *Stone v. Graham*²⁰³ involved a Kentucky statute that required the posting of

197. See *Glassroth v. Moore*, 242 F. Supp. 2d 1067, 1067 (M.D. Ala. 2002), *aff'd*, 335 F.3d 1282, 1303 (11th Cir. 2003), *cert. den.*, 540 U.S. 1000, 1000 (2003).

198. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 16-18.

199. See *id.* at 36-39. In a different context, a comprehensive doctrine was likewise at issue in an Italian court decision that ordered crucifixes removed from a public school. See *Vatican Rebukes Judge for Ban on Crucifixes*, N.Y. TIMES, Oct. 28, 2003, at A14.

200. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 60-62. For discussion of the social meaning of disparagement inherent in public religious symbolism, see EISGRUBER & SAGER, *supra* note 131, at 125-28.

201. RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, at 60-62.

202. See *id.* at xviii-xxiii.

203. 449 U.S. 39 (1980).

a copy of the Commandments on the wall of every public classroom.²⁰⁴ Citizens who opposed the posting of the Commandments claimed the statute violated the First Amendment and sought an injunction against its enforcement.²⁰⁵ The Kentucky Supreme Court, however, found the statute's purpose was secular, holding that it would neither advance nor inhibit religion or involve the state excessively in religious matters.²⁰⁶ On appeal, the U.S. Supreme Court reversed holding the statute had in fact no secular legislative purpose.²⁰⁷ Indeed, the Court found that the main purpose for "posting the Ten Commandments on schoolroom walls [was] plainly religious in nature[.]" since the Commandments were "undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose [could] blind [the Court] to that fact."²⁰⁸

A. *Van Orden v. Perry* (2005)

The Alabama case involving Judge Moore did not get very far in the Supreme Court, which declined to review it.²⁰⁹ More recently a closely divided Supreme Court handed down the two separate opinions that were mentioned earlier.²¹⁰ In the Texas case, *Van Orden v. Perry*,²¹¹ the Court held that a Ten Commandments monument on that state's Capitol grounds was constitutional,²¹² but in the Kentucky case, *McCreary County v. American Civil Liberties Union*,²¹³ the Court found that displays of the Commandments in two county courthouses was unconstitutional, violating the Establishment Clause.²¹⁴ As noted above, it may be possible to account for these disparate outcomes on the basis of varying facts or "contexts" as well as the fact that Justice Stephen Breyer voted on different sides of the constitutional fence in the two cases.²¹⁵ I will return to this issue below after summarizing the facts in *Van Orden*.

In 1961, a private organization, the Fraternal Order of Eagles, donated to Texas the six-foot high Ten Commandments monument that sits among

204. *Stone v. Graham*, 449 U.S. 39, 39 (1980).

205. *Id.* at 39-40.

206. *Id.* at 40.

207. *Id.* at 41, 43.

208. *Id.* at 41.

209. *See Moore*, 540 U.S. at 1000.

210. *See supra* Part II.

211. 545 U.S. at 677.

212. *Id.* at 681.

213. 545 U.S. at 844.

214. *Id.* at 850, 881.

215. *See id.* at 848 (syllabus) (noting Justice Breyer was in the majority); *Van Orden*, 545 U.S. at 679 (syllabus) (explaining that Justice Breyer concurred in the judgment).

many historical monuments on the Texas Capitol grounds.²¹⁶ As Chief Justice William Rehnquist explained in his *Van Orden* plurality opinion, “[t]he 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers commemorating the ‘people, ideals, and events that compose Texan identity.’”²¹⁷ The monuments included:

Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts’ Salute of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.²¹⁸

Except for the Ten Commandments display, the other monuments and markers did not have any apparent religious content, although they did appear to commemorate the people of Texas and ideals and events comprising “‘Texa[s] identity.’”²¹⁹ Rehnquist did not say how the Ten Commandments contributed to that identity.²²⁰ But as Eisgruber and Sager note, “The granite Decalogue has *no* special connection to Texas identity—a point made plain, if evidence were needed, by the fact that the Eagles donated identical monuments to Indiana, Utah, and other states.”²²¹

In upholding the constitutionality of the Texas monument, Rehnquist explained that the Court’s cases in this area looked “Januslike” in two directions.²²² One pointed to the important role that religion and religious traditions played in our nation’s history.²²³ To illustrate, he cited the famous 1962 case, *Engel v. Vitale*,²²⁴ which ruled that prayer in the public schools was unconstitutional while stating in passing that the “‘history of man is inseparable from the history of religion’”²²⁵ in order to counter the argument that prohibiting school prayer indicated “hostility toward religion or toward prayer.”²²⁶ Rehnquist also referred to a case from 1952, *Zorach v.*

216. *Van Orden*, 545 U.S. at 681-82.

217. *Id.* at 681.

218. *Id.* at 681 n.1.

219. *Id.* at 681 (quoting H. Res. 38, 77th Leg., Reg. Sess. (Tex. 2001)).

220. *See id.* at 677.

221. EISGRUBER & SAGER, *supra* note 131, at 146.

222. *Van Orden*, 545 U.S. at 683.

223. *Id.*

224. 370 U.S. 421 (1962).

225. *Van Orden*, 545 U.S. at 683, n.2 (quoting *Engel*, 370 U.S. at 434).

226. *Engel*, 370 U.S. at 433-34.

Clauson,²²⁷ which included the observation that ““We are a religious people whose institutions presuppose a Supreme Being.””²²⁸ We should note, however, that the legal issue in *Zorach* had nothing to do with a “Supreme Being;” instead it concerned the constitutionality of a law providing “released time” to allow public school children who wished to receive religious instruction for a half-hour per week to do so during normal school hours but not on school property.²²⁹ The Court’s rationale for upholding the “released time” program remains controversial,²³⁰ but here, too, the Court’s reference to our institutions presupposing a “Supreme Being” would appear to be no more than a sign of respect for religion in order to respond to arguments that the Court is hostile to religion by banning religious instruction in public schools.²³¹ In sum, neither of the two references to religion cited by Chief Justice Rehnquist had any real bearing on how the constitutional issue in *Van Orden* should be resolved.

The second direction that the Court’s religion cases looked to, Rehnquist said, was the principle that the government’s involvement in religious issues can jeopardize religious freedom.²³² For Rehnquist, reconciling these two concerns “requires that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage”²³³ That heritage, Rehnquist said, is found in the long history of the three branches of government recognizing the role of religion in our nation, noting, for example, that in 1789 both Houses of Congress issued resolutions asking President George Washington to declare a day of Thanksgiving to acknowledge ““the many and signal favors of Almighty God[,]’ directly attribut[ing] to the Supreme Being the foundations and successes of our young Nation””²³⁴

While it is true that Presidents John Adams and James Madison also issued Thanksgiving proclamations, the practice was nevertheless open to

227. 343 U.S. 306 (1952).

228. *Van Orden*, 545 U.S. at 683 n.2 (quoting *Zorach*, 343 U.S. at 313).

229. *Zorach*, 343 U.S. at 308.

230. For discussion and critique of the decision, see, e.g., GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 65-68.

231. See *Zorach*, 343 U.S. at 308-09.

232. *Van Orden*, 545 U.S. at 683.

233. *Id.* at 683-84. By referring to “our responsibility to maintain a division between church and state,” Rehnquist acknowledges some sense of separation of church and state, *Id.*, which contrasts with his frontal attack on Jefferson’s “wall of separation” in his dissent in *Wallace v. Jaffree*. 472 U.S. 38, 91-92 (1985). On the other hand, as noted above, Eisgruber and Sager likewise attack the “wall of separation” while still acknowledging several senses in which church and state are separate. EISGRUBER & SAGER, *supra* note 131, at 22-24.

234. *Van Orden*, 545 U.S. at 686-87 (quoting 1 Annals of Cong. 90, 914).

question. As Professor Douglas Laycock writes, “Madison did so only in time of war and at the request of Congress, and his proclamations merely invited citizens so disposed to unite their prayers on a single day.”²³⁵ As for Jefferson, he did not issue such proclamations, “believing them to be an establishment.”²³⁶ Later, in retirement, Madison also “concluded that . . . the Thanksgiving proclamations had violated the establishment clause.”²³⁷ Perhaps the lesson here is to recognize that while historical events are certainly undeniable facts about our past, their continuing significance and relevance to present circumstances and policy are always open to interpretation and new evaluations.

There are, however, various ways to reconcile government support for religion with Establishment Clause principles. Greenawalt identifies several of these under the rubric of “Mild Endorsements and Promotions.”²³⁸ We can see such an endorsement in the claim that “many of the references to religion have lost real religious significance, that they perform exclusively some civil ceremonial function.”²³⁹ But applying this view to issues like “Thanksgiving [Proclamations] and ‘under God’ in the Pledge of Allegiance,” Greenawalt observes, is “patently absurd.”²⁴⁰ He states that the Thanksgiving

holiday may well have civil ceremonial significance, but its religious content has certainly not disappeared. A “giving of thanks” is ordinarily conceived as a giving of thanks to someone, not just a grateful reflection on good fortune. In light of their actual religious beliefs, we can be confident that most Americans continue to regard Thanksgiving, as it was in its historic roots, as a giving of thanks *to God*.²⁴¹

In sum, Greenawalt’s remarks certainly lend some degree of confirmation to the correctness of Madison and Jefferson’s view that Thanksgiving proclamations constitute an endorsement and promotion of “establishment.”

Rehnquist also cited the presence of the Commandments in various places in and around the U.S. Supreme Court: in the rotunda of the Library

235. Douglas Laycock, “*Nonpreferential Aid to Religion: A False Claim About Original Intent*,” 27 WM. & MARY L. REV. 875 (1986), cited in STEVEN G. GEY, RELIGION AND THE STATE 41 (2nd ed. 2006).

236. *Id.*

237. *Id.*

238. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 91-94. For Justice O’Connor’s discussion of “ceremonial deism,” see Part III.

239. *Id.* at 92.

240. *Id.*

241. *Id.*

of Congress and in the National Archives, the Department of Justice and other public buildings in the nation's Capital.²⁴² These and other examples demonstrate, Rehnquist asserted, that the Commandments have an important *historical* meaning, leading him to conclude that “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”²⁴³ Here, too, Rehnquist is endowing historical facts with normative authority for present decisions. His implicit premise seems to be the proposition that if a practice was constitutional in the past (here, the placement of the Commandments in the public buildings he cites) then it is constitutional now (placing the monument on the Texas Capitol grounds).²⁴⁴ But his analogical reasoning is defective; for one thing, there is no analysis of the content of the Commandments in the public buildings, no reference to *which* Commandments are displayed in the public buildings.²⁴⁵ Of course the Commandments have something to do with law and lawgivers in history; otherwise they would not be on display in governmental institutions. But some of the Commandments are *secular* in nature, such as the prohibitions against murder, theft, and adultery, while many are clearly religious in nature.²⁴⁶ Chief Justice Rehnquist's opinion does not discuss this important distinction and how it applies to different contexts.²⁴⁷

Rehnquist did recognize limits to displaying religious symbols out of respect for our long-standing tradition of the separation of church and state. This limit was violated in the *Stone* case, where the display of the Commandments in public school classrooms had a plainly religious purpose, especially in light of the influence they might have on primary and secondary school children who would be exposed to them on a daily basis.²⁴⁸ In such circumstances, the claim that the separation of church and state was intact became very doubtful. In contrast, the presence “of the Ten Commandments monument on the Texas State Capitol grounds” was, Rehnquist emphasized, a more “passive use” of the Commandments than their placement in public schoolrooms.²⁴⁹ Yet this distinction is complex and needs to be explored more. On the one hand, it would seem that the Ten Commandments carry the same meaning and message in Kentucky's

242. *Van Orden*, 545 U.S. at 689.

243. *Id.* at 690.

244. *See id.* at 689.

245. *See id.*

246. *Id.* at 717.

247. *See Van Orden*, 545 U.S. at 717.

248. *Id.* at 690-91 (citing *Stone*, 449 U.S. at 41-42).

249. *Id.* at 545 U.S. at 691.

public schoolrooms as they do on the Texas Capitol's grounds.²⁵⁰ And contrary to Rehnquist's implicit assumption that school children would be more influenced by the Commandments posted in their classrooms than would citizens viewing the Ten Commandments monument on the Texas Capitol grounds,²⁵¹ it seems, from one perspective at least, that it is reasonable to believe that young children would be *less* likely to appreciate the significance of the Commandments on public property whereas adults might well question the propriety of the government's action. But Rehnquist's analysis did not discuss these issues; he simply concluded that the Ten Commandments display in the Texas case had a dual significance, both religious and historical, and on that basis held that they did not violate the Establishment Clause.²⁵²

Justice Kennedy joined Rehnquist's opinion, as did Justices Scalia and Thomas, both of whom filed concurring opinions.²⁵³ Justice Breyer, while not joining Rehnquist's opinion, filed a concurring opinion, agreeing with Rehnquist's conclusion that the Monument was not unconstitutional, but for reasons other than those Rehnquist had given.²⁵⁴ Justice O'Connor dissented without further comment, agreeing essentially with Justice Souter's dissent and also for the reasons she expressed in her concurrence in the *McCreary County* case, discussed below.²⁵⁵ Before turning to the *McCleary* decision I wish to comment on the dissenting opinions of Justices Stevens and Souter in *Van Orden*.

Justice Stevens began his dissent by observing that the Texas monument had no real "connection to God's role in the formation of Texas or the founding of our Nation"²⁵⁶ Instead, the message conveyed by the Monument "is quite plain: This State endorses the divine code of the 'Judeo-Christian' God."²⁵⁷ He continued:

The adornment of our public spaces with displays of religious symbols and messages undoubtedly provides comfort, even inspiration, to many individuals who subscribe to particular faiths. Unfortunately, the practice also runs the risk of "offend[ing]

250. *See id.* at 677; *see also Stone*, 449 U.S. at 39.

251. *See Van Orden*, 545 U.S. at 690-91.

252. *Id.* at 691-92.

253. *Id.* at 681, 692 (Opinion of the Court).

254. *Id.* at 704-705 (Breyer, J., concurring).

255. *Id.* at 737 (O'Connor, J., dissenting).

256. *Van Orden*, 545 U.S. at 707 (Stevens, J., dissenting).

257. *Id.*

nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.”²⁵⁸

For their part, Eisgruber and Sager “suspect that most people who value the Texas monument (and most people who object to it) do so because of its religious message, not because of its independent historical significance or its place in Texas culture.”²⁵⁹ And as I noted earlier, they also think “[t]he granite Decalogue has no special connection to “Texas identity”²⁶⁰

Stevens’s remarks about “disrespect” and “offending nonmembers” are pertinent to the rationale for political justice and public reason as well as to what Eisgruber and Sager say about “the pernicious element of disparagement” in public religious endorsements.²⁶¹ Stevens also referred to comments of Senator John Danforth, who stated that “efforts to haul references of God into the public square, into schools and courthouses, are far more apt to divide Americans than to advance faith.”²⁶² One might infer from those remarks that Stevens would oppose at least one part of Feldman’s solution for the church-state problem: allowing the values evangelicals a greater freedom to display symbolic expressions of their religious convictions in public places.²⁶³ According to Stevens, the Establishment Clause demands an *equal respect* for the atheist as it does for the members of a Christian faith, citing a 1985 decision in which the Court held that “the individual freedom of conscience protected by the *First Amendment* embodies the right to select any religious faith or *none at all*.”²⁶⁴ And as Justice Jackson wrote in his dissent in *Zorach v. Clauson*, “The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power.”²⁶⁵

There are, then, grave problems with the Texas monument. In addition, as Justice Stevens observed, the version of the Decalogue inscribed on the Texas monument was inherently sectarian in that it represented only one of many distinctive versions of the Ten Commandments, which differ from religion to religion and even within distinct denominations of a single

258. *Id.* at 708 (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 651 (1989) (Stevens, J., concurring in part and dissenting in part)).

259. EISGRUBER & SAGER, *supra* note 131, at 147.

260. *Id.* at 146.

261. *Id.* at 127; *see also Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).

262. *Van Orden*, 545 U.S. at 708 n.3 (quoting John Danforth, *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27).

263. *See id.*; *see also FELDMAN*, *supra* note 43, at 243-34.

264. *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting) (quoting *Wallace*, 472 U.S. at 52-53) (emphasis added).

265. *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting); *see Van Orden*, 545 U.S. at 711 n.7 (Stevens, J., dissenting).

religion.²⁶⁶ These differences, he said, have “enormous religious significance”²⁶⁷ (a point that Nussbaum discusses in some detail).²⁶⁸ For example, “[i]n choosing to display this version of the Commandments,” Stevens wrote, “Texas tells the observer that the State supports this side of the doctrinal religious debates.”²⁶⁹ But even if the monument’s message could reflect all Judeo-Christians’ belief systems, it would, Stevens says, still violate the Establishment Clause by virtue of “prescribing a compelled code of conduct from one God, namely, a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism.”²⁷⁰ On this point, Greenawalt initially observes that “[i]t is a more difficult question whether a display of Christian messages would be all right if everyone were Christian.”²⁷¹ Nonetheless, he writes, “[o]n the view that people are free not to continue to be Christian, that the government is not competent about religion, and that sponsoring religion is not its business, the government should not convey Christian messages even if everyone is Christian.”²⁷² It’s notable that Nussbaum makes a somewhat broader point when she says, “[e]ven the establishment of *all* religion . . . does not solve the equality problem,”²⁷³ a point that Stevens also makes in saying that the Ten Commandments violate the Establishment Clause by requiring a preference for religion over irreligion, contradicting Supreme Court precedent according to which the “Establishment Clause ‘guarantee[s] religious liberty and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.’”²⁷⁴

Finally, responding to Chief Justice Rehnquist’s statement that the Texas monument merely constituted a “passive use” of the Ten Commandments, Stevens, by contrast, thought

[t]he monolith displayed on the Texas Capitol grounds cannot be discounted as a passive acknowledgment of religion, nor can the State’s refusal to remove it upon objection be explained as a simple desire to preserve a historic relic. This Nation’s resolute commitment to neutrality with re-

266. *Van Orden*, 545 U.S. at 717-718 (Stevens, J., dissenting).

267. *Id.*

268. NUSSBAUM, *supra* note 7, at 256-265.

269. *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

270. *Id.* at 719.

271. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 69 n.2.

272. *Id.* at 69-70, n.2.

273. NUSSBAUM, *supra* note 7, at 225 (emphasis added).

274. *Van Orden*, 545 U.S. at 719-720 (quoting *Wallace*, 472 U.S. at 52).

spect to religion is flatly inconsistent with the [Court's] wholehearted validation of an official state endorsement of the message that there is one, and only one, God.²⁷⁵

From Stevens's perspective, far from being a "passive use" of the Commandments, the Texas monument was actually very "activist" because it was promoting a sectarian version of the Commandments that was prejudicial to other versions and to all those who do not accept any version or any religion at all.²⁷⁶

Moving to Justice Souter's dissent, one part of his opinion contains a rejoinder to Rehnquist's emphasis on the harmless presence of the Ten Commandments in public buildings in the nation's Capital, including the Supreme Court. Again, the implication in Rehnquist's reference to displays of the Commandments in those public buildings was the assumption that if they are harmless there, they are also harmless in the Texas setting.²⁷⁷ Souter challenged that assumption by noting that in contrast to the Texas monument's presentation of the Commandments with the religious text emphasized and enhanced, the examples cited by Rehnquist were indeed perfectly constitutional.²⁷⁸ "[T]he frieze [in the Supreme Court's] own Courtroom provid[ed] a good example, where the figure of Moses stands among [many of] history's great lawgivers[,]” enjoying no special prominence, with only the secular commandments displayed (forbidding such things as killing and theft) but not the religious or divine commandments.²⁷⁹ That difference alone is sufficient to distinguish the presence of the Ten Commandments in the Supreme Court from the Texas monument, with its emphasis on the "religious or divine" Commandments.²⁸⁰

Like Justice Souter, Eisgruber and Sager suggest the right solution would be to remove the monument in circumstances where people object to it on religious grounds;²⁸¹ but they also tend to agree with what Justice Breyer said in explaining his crucial vote in *Van Orden*: "This display has stood apparently uncontested for nearly two generations. That experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in

275. *Id.* at 712 (Stevens, J., dissenting).

276. *See id.*

277. *Id.* at 689 (Opinion of the Court).

278. *Id.* at 739-740 (Souter, J., dissenting).

279. *Van Orden*, 545 U.S. at 740-41.

280. *See Van Orden*, 545 U.S. at 691-92 (Opinion of the Court).

281. EISGRUBER & SAGER, *supra* note 131, at 147; *see Van Orden*, 545 U.S. at 739-740 (Souter, J., dissenting).

a borderline case such as this one.”²⁸² But as Nussbaum notes, Breyer thereby introduces a novel understanding of the Establishment Clause, according to which its primary purpose is to avoid divisiveness and conflict, ignoring the equality/endorsement theory that previous cases had emphasized.²⁸³ As Nussbaum writes, “Should we really say that a display that everyone likes and that isn’t stirring up trouble, because the offended minorities are too powerless to make trouble, is for that reason constitutional?”²⁸⁴

As for Dworkin, he does not discuss the Ten Commandments issue as such, so his position on the matter is not evident. But as we’ll see below, based on his view that the words “under God” in the Pledge of allegiance constitute a “violation of liberty,” he may well oppose public displays of the Ten Commandments as well.²⁸⁵ Feldman, on the other hand, is sympathetic to allowing more religious symbolism in the public square, partly as a matter of “pragmatic politics” to assuage the sense of exclusion that evangelicals have, according to Feldman, experienced in the wake of the success of legal secularism in getting the courts to remove many traditional religious symbols from the public sphere.²⁸⁶ So, unlike Eisgruber and Sager, and possibly Dworkin, Feldman may well endorse the conclusion reached in the majority opinion in *Van Orden*, upholding the constitutionality of the Texas display of the Ten Commandments.

B. McCreary County v. ACLU

On the same day that *Van Orden* was handed down, the Court reached a contrary result in *McCreary County v. ACLU*.²⁸⁷ By an identical vote of 5 to 4, the Court held the displays of the Commandments in two county courthouses in Kentucky in violation of the Establishment Clause because the displays lacked a secular purpose.²⁸⁸ Justice Souter delivered the opinion of the Court, joined by Justices Stevens, O’Connor, Ginsburg, and Breyer, with Justice Antonin Scalia filing a dissenting opinion.²⁸⁹ The majority in this case was made up of the dissenters in *Van Orden*, but now

282. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment); see EISGRUBER & SAGER, *supra* note 131, at 147.

283. NUSSBAUM, *supra* note 7, at 263.

284. *Id.*

285. See DWORKIN, *supra* note 91, at 85.

286. FELDMAN, *supra* note 43, at 243.

287. 545 U.S. at 844; see *Van Orden*, 545 U.S. 677 (showing the decision was handed down on June 27, 2005).

288. *McCreary*, 545 U.S. at 881.

289. *Id.* at 849, 885.

joined by Justice Breyer, who had agreed with the result in *Van Orden*.²⁹⁰ Thus the *McCreary* majority opinion was largely the flip side of the voting pattern in *Van Orden*. The same four Justices voted to uphold the public displays of the Commandments in each of the two cases, and another set of four Justices found both displays unconstitutional.²⁹¹ Justice Breyer was the critical swing vote in the two decisions.²⁹²

As noted above, “context” was a factor in both cases and may provide a more substantive way to explain the conflicting decisions. In *Van Orden*, the grounds surrounding the Texas Capitol and the placement of the Ten Commandments monument among many secular monuments and markers provided much of the relevant context.²⁹³ As earlier noted, Chief Justice Rehnquist thought that whatever the influence the Commandments might have in this setting was minor and “passive.”²⁹⁴ By contrast, in *McCreary* the context was arguably one where the Commandments would be more likely to influence visitors to the courts inasmuch as they were placed in high traffic areas.²⁹⁵ But just how much weight should be given to these contextual differences, or whether they should be given any weight at all, is debatable. Justices Stevens, Souter and Ginsberg did not think the two contexts warranted different outcomes.²⁹⁶

Part of the context in *McCreary* included the evolution of the display in three separate presentations of the Commandments. The initial display had consisted of a “cop[y] of an abridged text of the King James version of the . . . Commandments, [along with] a citation to the Book of Exodus.”²⁹⁷ The display stood alone without being part of a secular display, and was presented without a “disclaimer that the [Ten] Commandments were set out to show their effect on the civil law.”²⁹⁸ This first version of the display thus appeared to have an unmistakable religious objective.²⁹⁹

The second version of the display was installed within a month after suit had been filed challenging the first display.³⁰⁰ This version added eight historical documents, “each [one] either having a religious theme or . . . highlight[ing] a religious element.”³⁰¹ It had been authorized by county

290. *Id.* at 849; *Van Orden*, 545 U.S. at 680.

291. *McCreary*, 545 U.S. at 849; *Van Orden*, 545 U.S. at 680.

292. *See McCreary*, 545 U.S. at 849; *Van Orden*, 545 U.S. at 680.

293. *Van Orden*, 545 U.S. at 681.

294. *Id.* at 691.

295. *McCreary*, 545 U.S. at 851.

296. *See Van Orden*, 545 U.S. at 743 n.6 (Stevens, J., dissenting).

297. *McCreary*, 545 U.S. at 851.

298. *Id.* at 868-69.

299. *See id.*

300. *Id.* at 852-53.

301. *Id.* at 853-54.

resolutions, which stated “that the Ten Commandments [were] ‘the precedent legal code upon which the civil and criminal codes of . . . Kentucky [were] founded’”³⁰² Here, too, based on the content of the display and the county resolutions, the display again seemed to “present[] an indisputable . . . showing of an impermissible [religious] purpose.”³⁰³

The third and final version of the display again quoted the King James version of the Commandments, but at greater length, and included eight other documents (for the most part different from those in the second display) which were said to be foundational to American government.³⁰⁴ Under the circumstances, and in light of the two prior displays, the Court found that the counties’ predominantly religious purpose had not changed at the third stage of the displays.³⁰⁵

Souter’s majority opinion emphasized the continuing importance of governmental neutrality toward religion, in sharp contrast to Kentucky’s purpose in posting the Ten Commandments. The “touchstone” of Souter’s analysis was “the principle that the ‘*First Amendment* mandates governmental neutrality between religion and religion, and between religion and nonreligion.”³⁰⁶ Justice Souter continued: “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central *Establishment Clause* value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”³⁰⁷ Justice Souter, quoting a dissenting Justice Breyer in another decision, further stated that “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the ‘understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.’”³⁰⁸

Justice O’Connor’s concurring opinion likewise noted the violation of neutrality in Kentucky’s display, stating that “[t]he purpose behind the counties’ display is relevant because it conveys an unmistakable message of

302. *McCreary*, 545 U.S. at 853.

303. *Id.* at 870.

304. *Id.* at 855-56.

305. *Id.* at 870-74.

306. *Id.* at 860 (quoting *Epperson*, 393 U.S. at 104; *Everson*, 330 U.S. at 15-16; *Wallace*, 472 U.S. at 53).

307. *McCreary*, 545 U.S. at 860 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (“*Lemon*’s ‘purpose’ requirement aims at preventing [government] from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.”)).

308. *Id.* at 860 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)).

endorsement to the reasonable observer.”³⁰⁹ In the language of Rawls’s *Political Liberalism*, Kentucky was thereby endorsing a comprehensive religious doctrine that ran afoul of the Establishment Clause as well as being inconsistent with a political conception of justice.³¹⁰ But if Justice Stevens’s dissent in *Van Orden* is correct, Texas’s purpose in erecting its monument was equally an endorsement of the Ten Commandments, and a sectarian version of them as well.

Finally, Justice Scalia wrote a long and scathing dissent from Justice Souter’s opinion for the Court as well as from Justice O’Connor’s concurring opinion, citing a plethora of references to God, the divine, and religion made by public officials and a number of Presidents, including Washington and Jefferson in their Inaugural or Farewell addresses.³¹¹ His cascade of references was meant to discredit the idea of government neutrality, which, as we have seen, is the “touchstone” of the opinions by Justices Souter and O’Connor.³¹² Yet Scalia’s examples of statements acknowledging the importance of religion and even the propriety of government favoritism toward a particular religion are not based on the Court’s decisions under the Establishment Clause—including those handed down in the last sixty years and applying the neutrality principle in rejecting governmental favoritism toward a particular religion. Whatever the founding generation may have thought about the role of religion in the state, the Establishment Clause, as we saw in Part I of this Article, has long ago come to stand for several senses of separation of church and state. Each of the authors we canvassed in Part I with respect to their models of the church-state relationship are in agreement with most if not all of these meanings of separation as well as the related idea of government neutrality toward religion. In these days of robust religious pluralism in the U.S. and elsewhere, it is the rare philosopher or lawyer who would oppose governmental neutrality toward religion or fail to recognize a significant degree of separation between church and state. In any event, Justice Scalia’s “originalism” confronts a world somewhat different from the one he imagines existed over two hundred years ago—imagines, for it is not at all clear that the founding generation shared his anti-neutrality perspective, or his view, as Justice Souter characterized it, “that government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty.”³¹³

309. *Id.* at 883 (O’Connor, J., concurring).

310. *See* RAWLS, *POLITICAL LIBERALISM*, *supra* note 2, 11-15.

311. *See McCreary*, 545 U.S. at 886-87 (Scalia, J., dissenting).

312. *See id.* 860, 886-87.

313. *Id.* at 880.

However one views the disparate outcomes in *Van Orden* and *McCreary*, one thing is clear: the Supreme Court is divided on the constitutionality of displaying the Commandments in public places. But we must remember that the Court ruled in the 1981 *Stone* decision that displays of the Commandments in public school *classrooms* was unconstitutional,³¹⁴ and in the more recent *McCreary* case it held that similar displays in county *courthouses* were likewise unconstitutional.³¹⁵ This means that displays of the Commandments in similar contexts will likely continue to be found unconstitutional. In applying the Establishment Clause in those cases, the Court was separating political and educational institutions from religion and enforcing a political conception of justice that refuses to favor or endorse one doctrine while disrespecting and disparaging others, or endorsing religion over irreligion. Yet by holding the *McCreary* displays unconstitutional, the Court was not espousing secularism but simply affirming one legitimate sense of the separation of church and state, with which Dworkin, Eisgruber, Sager, Nussbaum, and Greenawalt, if not Feldman, all affirm in one way or another.

I turn now to another contentious issue that has come before the Court in the recent past and which may come before it again, the constitutionality of the words “under God” in the Pledge of Allegiance.

III. CAN “UNDER GOD” BE DEFENDED ON REASONABLE GROUNDS?

In 1892 the Pledge of Allegiance was introduced in New York City at an October Columbus Day celebration attended by thousands of schoolchildren.³¹⁶ Later that month millions of students across the country recited the Pledge on what was believed to be “the true four-hundredth anniversary of Columbus’s discovery of America”³¹⁷ In 1898 New York became the first state to *require* students to recite the Pledge in public schools at the outset of each school day,³¹⁸ and in 1942 Congress gave official recognition to the Pledge by including it in the U.S. Flag Code.³¹⁹

314. *Stone*, 449 U.S. at 39, 42-43.

315. *McCreary*, 545 U.S. at 850, 857, 881.

316. RICHARD J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE 19, 21 (2005). “The Pledge of Allegiance appeared in print for the first time on September 9, 1892, when the *Youth’s Companion* published the official program for the Columbus Day celebration. Every school in the nation was instructed to follow the program and to begin preparations for the celebration.” *Id.* at 19. The celebration was to occur on October 12, but Congress changed the date to October 21. *Id.* at 21. However, New York decided to stick to the original date, and began celebrations on October 10 which ran through October 12. *Id.*

317. *Id.* at 21.

318. ELLIS, *supra* note 318, at 52.

319. *Id.* at 116-18.

In 1954 Congress added the words “under God” to the Pledge during the Cold War with the Soviet Union in order to indicate that the United States, unlike the Soviet Union, was a Nation that believed in God.³²⁰ On Flag Day in June of 1954, President Dwight Eisenhower signed the measure into law, declaring:

From this day forward . . . millions of our schoolchildren will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty. To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country’s true meaning.³²¹

The inclusion of the words “under God,” the President continued, “reaffirmed ‘the transcendence of religious faith in America’s heritage and future. In this way we shall constantly strengthen those spiritual weapons which forever will be our country’s most powerful resource, in peace or in war.’”³²²

In light of Eisenhower’s proclamation, which rivals the one Congress asked George Washington to issue for a Day of Thanksgiving in 1789, one might well wonder whether Buddhists, polytheists, atheists, and many others felt excluded or, reverting to Justice Stevens’s sentiment in the *Van Orden* case, disrespected.³²³ But even before the 1954 insertion of “under God” into the Pledge, there was significant controversy over the Pledge for other reasons. Two Supreme Court cases from the 1940s raised the issue of whether school children could be required to salute the flag and recite the Pledge of Allegiance.³²⁴ The first case involved two Pennsylvania school children, Lillian and William Gobitis, aged twelve and ten, who were expelled from their public school for refusing to salute the flag, which was a daily ceremony in which both teachers and students were required to participate.³²⁵ The children’s refusal was based on their family’s religion, Jehovah’s Witnesses, for whom such a gesture of respect for the flag or any icon or image was idolatrous and forbidden by their understanding of Scripture.³²⁶

320. MARC LEEPSON, *FLAG: AN AMERICAN BIOGRAPHY* 173-74 (2005).

321. *Id.* at 174 (quoting President Dwight D. Eisenhower, Statement by the President Upon Signing Bill To Include the Words “Under God” in the Pledge to the Flag (June 14, 1954)).

322. *Id.*

323. *See Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting).

324. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

325. *Gobitis*, 310 U.S. at 591.

326. *Id.* at 591-92.

Nonetheless, the Supreme Court held that the “state regulation requiring . . . pupils in the public schools, on pain of expulsion, [to] participate in [the] daily ceremony of saluting the . . . flag” and reciting the Pledge was constitutional.³²⁷ It was, the Court said, “within the scope of legislative power[] and consistent with the . . . [Constitution, notwithstanding] a conscientious religious belief that such obeisance to the flag is forbidden by the Bible and that the Bible, as the Word of God, is the supreme authority.”³²⁸ “Religious convictions[,]” the Court observed, “do not relieve the individual from obedience to an otherwise valid general law [that is] not aimed at the promotion or restriction of religious beliefs.”³²⁹ As “far as the . . . Constitution is concerned, [the Court said] it is within the province of . . . legislatures and school authorities . . . to adopt appropriate means to evoke and foster a [sense] of national unity among [public school] children.”³³⁰

But that was not the end of the matter. Just three years later, in the famous case of *West Virginia State Board of Education v. Barnette*,³³¹ the Supreme Court overruled the *Gobitis* decision and held that school children could *not* be required to salute the flag or recite the Pledge, nor be expelled from school for refusing to do so.³³² The West Virginia policy that was challenged in *Barnette* (likewise by Jehovah’s Witnesses) was similar to the one at issue in the earlier *Gobitis* case.³³³ Several students were expelled from public schools after refusing on religious grounds to salute the flag.³³⁴ Writing for the Court, Justice Robert Jackson ended his opinion with these memorable words: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³³⁵ From that day forward, no one could be required to salute the flag or recite the Pledge.³³⁶ But even that would not put an end to all objections to the Pledge.³³⁷

327. *Id.* at syllabus, 591.

328. *Id.*

329. *Id.* at syllabus, 594.

330. *Gobitis*, 310 U.S. at syllabus, 598.

331. 319 U.S. at 624.

332. *Id.* at 642.

333. *Id.* at 629.

334. *Id.* at 630.

335. *Id.* at 642.

336. *See Barnette*, 319 U.S. at 642.

337. For more discussion and detailed analysis of the opinions in the *Gobitis* and *Barnette* cases, see Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 433 (Michael C. Dorf ed., 2004).

A. *The Newdow Case*

Many years later, in 2003, the Supreme Court was faced with a challenge to the Pledge's words, "under God," by a father of an elementary school student in Elk Grove, California.³³⁸ President Eisenhower's 1954 Proclamation arguably provides important background for the *Elk Grove* case. It is salient because the father, Michael Newdow, claimed that "under God" violated the First Amendment's Establishment and Free Exercise Clauses by endorsing a religious belief and indoctrinating his daughter, against his wishes, in conformity with that belief in God.³³⁹ President Eisenhower's words, however laudable in the eyes of millions of Americans in 1954 and perhaps even today, was further evidence of the government's endorsement of religious faith, based on Eisenhower's statement that the insertion of "under God" into the Pledge demonstrated "the dedication of our nation and our people to the Almighty."³⁴⁰ Those words are powerful evidence of the religious motivation and purpose underlying the original introduction of "under God" into the Pledge of Allegiance, and they are pertinent to the challenge presented in *Newdow*.

Before *Newdow* reached the Supreme Court, the Ninth Circuit Court of Appeals in California had found in favor of Mr. Newdow, holding that both the federal statute that added the words "under God" to the Pledge and the policy requiring the daily recital of the Pledge in classrooms within the public school district where Mr. Newdow's daughter attended school, were in violation of the Establishment Clause.³⁴¹ Later, in an amended opinion, the same court held the school policy unconstitutional but did not reach the question of the constitutionality of the federal statute.³⁴²

Strong criticism of the California court decision was quick to emerge from members of Congress, President Bush, and even from Justice Antonin Scalia, who later stepped aside and recused himself when the case reached the U.S. Supreme Court.³⁴³ Writing for a five justice majority, Justice John Paul Stevens held that Newdow lacked "standing" to challenge the school district's policy on the group recitation of the Pledge.³⁴⁴ The principal basis

338. *Newdow*, 542 U.S. at 4-5.

339. *Id.* at 5.

340. See LEEPSON, *supra* note 322, at 174.

341. *Newdow v. United States Cong. (Newdow I)*, 292 F.3d 597, 612 (9th Cir. 2002), *amended and superseded by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom Elk Grove*, 542 U.S. at 1.

342. See *Newdow v. United States Cong. (Newdow II)*, 328 F.3d. 466, 490 (9th Cir. 2003), *rev'd sub nom Elk Grove*, 542 U.S. at 1.

343. Matthew Rothschild, *A Pledge to Establish Religion*, THE PROGRESSIVE (July 6, 2002), www.progressive.org/node/1515; see *Elk Grove*, 542 U.S. at syllabus (Justice Scalia recused himself from the consideration and decision of the case).

344. *Elk Grove*, 542 U.S. at 17-18.

for holding that Newdow lacked standing was the fact that his daughter's mother, Sandra Banning, had primary legal custody of her daughter and the right to make decisions about her education and welfare.³⁴⁵ Consequently, Justice Stevens did not reach the merits of Newdow's constitutional challenge, leaving the substance of his complaint unresolved.³⁴⁶

Chief Justice Rehnquist and Justices Sandra Day O'Connor and Clarence Thomas wrote opinions concurring in the judgment. But unlike Stevens, all three thought Newdow did have standing to bring the lawsuit and they proceeded to address the substantive merits of his complaint that "under God" violated the Constitution.³⁴⁷ In defense of the challenged words, Rehnquist cited a number of Presidents from Washington to Eisenhower who had referred to God in public speeches.³⁴⁸ He said that the phrase "under God" was not part of a religious exercise or a prayer, nor the "endorsement of any religion"³⁴⁹ For Rehnquist, historical practice was once again an important factor, just as it had been in his majority opinion in *Van Orden*.³⁵⁰ "Under God," he said, was simply a way of expressing how our national culture has always permitted public recognition "that our Nation was founded on a fundamental belief in God."³⁵¹ But even assuming the truth of his claim about our nation's *past*, the language of the Pledge does not refer to history at all but is expressed entirely in the present tense, which is contrary to Rehnquist's central point.

In sum, rather than give Newdow a sort of "heckler's veto" over a patriotic ceremony, the Constitution, Rehnquist said, only requires that schoolchildren, following the holding in the landmark *Barnette* case, have a right *not* to participate in the Pledge ceremony if they so choose.³⁵² But while schoolchildren do have that right, there are other constitutional problems with the consequences of a child's choice not to participate in reciting the Pledge, such as being perceived as an unpatriotic "outsider." Here it will be instructive to compare how the several theorists we discussed in Part I dealt with this sensitive issue, which Rehnquist does not touch on.

345. *See id.* at 13-17.

346. *Id.* at 17.

347. *Id.* at 24-25 (Rehnquist, J., concurring); *id.* at 33 (O'Connor, J., concurring); *Elk Grove*, 542 U.S. at 45 (Thomas, J., concurring).

348. *See id.* at 26-29 (Rehnquist, J., concurring).

349. *Id.* at 31.

350. *See Van Orden*, 545 U.S. at 677.

351. *Elk Grove*, 542 U.S. at 31 (quoting H.R. REP. NO. 1693, at 2 (1954)).

352. *See id.* at 33; *see also Barnette*, 319 U.S. at 642 (holding that students cannot be required to salute the Flag or recite the Pledge).

Feldman's discussion shows the least concern over the matter. He thinks that atheists, like Michael Newdow, who feel excluded by public religious references, miss the point.³⁵³ Feldman claims that,

it is largely an interpretive choice to feel excluded by the fact of other people's faith, and the atheist can just as easily adhere to his own views while insisting on his citizenship. So long as Newdow's daughter is not coerced into invoking God while reciting the Pledge in school, it makes little sense to accommodate his beliefs by barring everyone else from saying the words that one person finds exclusionary.³⁵⁴

But this view seems clearly wrong, for by making Newdow's feelings of exclusion a matter of subjective interpretation, Feldman ignores the *nature* and *import* of the words expressed and suggests the mere desire to utter the words trumps any and all objections to them. But the underlying issue is the fact that it is the *government* that has authorized a public school to use the words in question in the Pledge.

Of course, a great many people do find the Pledge's reference to God exclusionary on conscientious grounds. But Feldman's position is consistent with his proposal that values evangelicals should be allowed to express more religious symbolism in the public square, which here would arguably include the Pledge's 'under God.'³⁵⁵ Yet many will reject his view that feelings of exclusion are merely subjective interpretive choices, and insist that there are objective grounds for such sentiments, just as there can be objective grounds for feeling insulted or disrespected in countless contexts. According to Eisgruber and Sager, despite Feldman's benign intentions, he nonetheless "sounds remarkably like Justice Brown, the nineteenth-century jurist who said that if African-Americans regarded segregation as a 'badge of inferiority' it was only because 'the colored race chooses to put that construction upon it.'"³⁵⁶ At the same time, Feldman, somewhat inconsistently, also refers to many "evangelicals [who] feel excluded from full citizenship by what they perceive as the removal of traditional religious symbols from public space."³⁵⁷ By Feldman's own standards, their feelings might also be a subjective "interpretive choice."³⁵⁸

353. FELDMAN, *supra* note 43, at 242.

354. *Id.*

355. *See id.* at 243.

356. EISGRUBER & SAGER, *supra* note 131, at 156 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)).

357. FELDMAN, *supra* note 43, at 243.

358. *Id.* at 242.

By contrast, Dworkin is considerably more concerned with the impact of the pledge's words, for the principle of dignity that he defends "assigns us a positive responsibility to choose ethical values for ourselves" ³⁵⁹ He continues:

There can be no distributive justification for creating an official pledge that makes full citizens feel like outsiders. There can be only a personally judgmental justification: deliberately influencing the shared culture to associate religion and patriotism on the ground that that association is desirable, in a way that makes it more difficult for someone who wishes to embrace patriotism free of religion to do so. It is plainly part of people's responsibility for their own values to define for themselves the religious or metaphysical assumptions of political allegiance. The coercive impact of an officially endorsed ritual is no more acceptable than the open manipulation of compelled assertion. ³⁶⁰

Dworkin's position is consistent with his defense of a tolerant secular society that I discussed in Part I. ³⁶¹ But it is surprising that despite his opposition to "subordination" and his severe criticism of the pledge's words, Dworkin does not think the coercive impact of "under God" is very strong, and though he believes "the official pledge is a violation of liberty," he concludes that "it is not a practically serious one." ³⁶² The latter point is difficult to reconcile with his contention that "an officially endorsed ritual is no more acceptable than the open manipulation of compelled assertion." ³⁶³ In any case, for Dworkin there is an evident wrong involved here, but apparently not one that requires a remedy, such as removing the offending words from the Pledge.

Eisgruber and Sager go a good deal further in their criticism of the Pledge's words and even propose an alternative wording for those who object to "under God." ³⁶⁴ They believe the current form of the Pledge is unconstitutional, arguing that the Pledge's reference to God has several underlying "vices: first, its social meaning [suggests] that only those comfortable with proclaiming the United States to be a nation 'under God' are worthy to formally declare their allegiance; and second, it in fact permits only those who can comfortably participate in such a proclamation to

359. DWORKIN, *supra* note 91, at 85.

360. *Id.* at 85.

361. *See supra* Part I.B.

362. DWORKIN, *supra* note 91, at 85.

363. *Id.*

364. *See* EISGRUBER & SAGER, *supra* note 131, at 150-52.

formally declare their allegiance.”³⁶⁵ They also argue that the Pledge appears to violate “at least the spirit of Article VI of the Constitution,” according to which “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”³⁶⁶ Assuming that this provision should apply not only to public officials like judges and governors but also to the ordinary “office” of citizen, they conclude that requiring people to use religious words to pledge “fidelity to the United States [is a form of] ‘religious test’ prohibited by Article VI”³⁶⁷

The latter point is germane to the remedy they propose, which begins with the recognition that ordinary citizens as well as public officials already have a *choice* when they are asked, in a great number of public ceremonies, to take an oath, for example the oath to tell the truth as a witness in court, or to uphold the Constitution and laws as a condition for gaining a license to practice law, or upon assuming the duties of any number of public offices and public roles.³⁶⁸ Such oaths usually involve some religious reference, such as to the Bible or to God.³⁶⁹ But all these “oath ceremonies” have one very important feature: “every one of them makes available an alternative, secular form of declaration that does not involve the Bible, the invocation of God, or any other religious reference.”³⁷⁰ Indeed, even American Presidents, on the cusp of assuming office, have an option, either swearing (the religious option) or affirming (the secular option) to “carry out their responsibilities and uphold the Constitution.”³⁷¹

In short, the “constitutional vices” that Eisgruber and Sager see in the present form of the Pledge, as well as the “violation of liberty” that Dworkin attributes to it, “can be cured by giving schoolchildren the same choice as presidents—the choice between pledging their fidelity in religious terms or pledging their fidelity in secular terms.”³⁷² Congress could identify the secular form of the words in the Pledge, and for this choice Eisgruber and Sager’s favorite candidate is “‘one Nation, under *law*.”³⁷³ Once Congress makes that (or an analogous) alternative available, schools could

365. *Id.* at 149.

366. *Id.*

367. *Id.*; see also *Torcaso v. Watkins*, 367 U.S. 488, 488-89, 495-96 (1961).

368. See EISGRUBER & SAGER, *supra* note 131, at 149-50.

369. See *id.* at 150; see, e.g., 5 U.S.C.S. § 3331 (LexisNexis 2012).

370. EISGRUBER & SAGER, *supra* note 131, at 150.

371. *Id.* at 150-51.

372. *Id.* at 151-52.

373. *Id.* at 152, 305 n.39.

then tell students that there are two equally valid forms of the Pledge and that the choice is theirs to make.³⁷⁴

Were this done, we think the constitutional objections to the Pledge and to the language ‘under God’ would be fully met. No one would be denied the opportunity to proclaim America ‘one Nation, under God,’ but neither would anyone be forced to make that proclamation upon penalty of being denied the opportunity to pledge his or her allegiance.³⁷⁵

In multiple ways, Nussbaum is no less critical of the Pledge’s “under God” than Dworkin or Eisgruber and Sager.³⁷⁶ The main focus of her criticism is somewhat different, but relevant and cogent. Her major argument is founded on the extensive religious *diversity* in the United States, which is far greater now than it was in 1954 when Congress added “under God” to the Pledge.³⁷⁷ At that time, most Americans believed in a monotheistic God and had little knowledge about polytheistic religions or those that did not recognize a supreme being or a God at all.³⁷⁸ Today, even if we only counted Christians, a clear majority of Americans continue to believe in a singular, monotheistic God, and while there is more awareness of other religions, such as Hindu, Buddhist, and Muslim faiths, there is still a good deal of ignorance about these religions.³⁷⁹ Moreover, there is little concern for how those religions differ from Judeo-Christian monotheism, and, more importantly, how those differences are ignored, dismissed, and undervalued by public officials and courts.³⁸⁰

In short, Nussbaum reminds us that there are several new groups of Americans who have reason to object to the recitation of the Pledge in its current form. A partial listing of those groups includes:

374. *Id.* at 152.

375. EISGRUBER & SAGER, *supra* note 131, at 152. Eisgruber and Sager submitted a friend-of-the-court brief in support of Michael Newdow in the *Elk Grove* case, arguing that “Under God” in the Pledge, in the absence of alternative secular words, violates the Establishment Clause. Brief of Christopher L. Eisgruber and Lawrence G. Sager as Amici Curiae Supporting Respondent Michael A. Newdow at 1-25 *Elk Grove Unified School District v. Michael A. Newdow*, 542 U.S. 1 (2004) (No. 02-1624). This is an example of their “equal liberty” theory of the religion clauses.

376. *See* NUSSBAUM, *supra* note 7, at 310-16.

377. *See id.* at 308-16.

378. DWORKIN, *supra* note 91, at 66.

379. *See* Dr. Natana J. Delong-Bas, ‘All-American Muslims’ and Christians, ARAB NEWS (Jan. 5, 2012), <http://arabnews.com/opinion/columns/article558847.ece>; *see also* Wendy Kaminer, *Religious Ignorance as a Threat to Civil Liberty*, THE ATLANTIC (Oct. 15, 2010), <http://www.theatlantic.com/national/archive/2010/10/religious-ignorance-as-a-threat-to-civil-liberty/64647/>.

380. *See* Kaminer, *supra* note 379.

[A]theists, agnostics, believers in a detached God who does not take a direct interest in human affairs, believers in a God who looks for right conduct and thus does not take a particular interest in Americans over Russians just because Americans (many of them) believe in God and Russians (many of them) are atheists, believers in a plurality of gods, believers in religions that do not assert the existence of a God. Hindus, Buddhists, Jains, Sikhs, Unitarians, and some types of Jews and Christians now have conscientious grounds for objection [to the daily recitation of the Pledge of Allegiance].³⁸¹

The list could go on, but what's important to notice is that it is not just atheists who object to "under God;" many people of faith find those words incompatible with—even disparaging of—their own beliefs, and this has the further consequence of making those people less than equal in the public square. Evidence for the latter point is found even in the U.S. Supreme Court, where Justice Scalia has attacked the idea that the Constitution requires the public sphere to be fair to citizens of different religions and those who subscribe to none.³⁸² He has stated that "the government [can] favor monotheism and disfavor polytheism, nontheistic religion, nonreligion, and even versions of monotheism that think of God as 'unconcerned.'"³⁸³ Regarding Scalia's last point, it is undisputed that a substantial number of early Americans of extraordinary prominence did embrace the belief in a God that is detached and unconcerned.³⁸⁴ But even if there were no polytheists or believers in "unconcerned deities" in our history, Scalia's reliance on historical practices as a *justification* for current policies is simply untenable. The fact that a practice occurs and endures over a long period of time does not justify it. The long history of racism, segregation, the subordination of women, and many other social practices, did not mean that the Constitution therefore permitted, much less endorsed them.³⁸⁵ A practice is open to change, revision and even rejection, as when the emergence of new or for-

381. NUSSBAUM, *supra* note 7, at 309.

382. *See McCreary*, 545 U.S. at 885-912 (Scalia, J., dissenting).

383. NUSSBAUM, *supra* note 7, at 231-32, 268-69. *See McCreary*, 545 U.S. at 893 (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's *historical practices* that the *Establishment Clause* permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." (emphasis added)).

384. *See, e.g.*, DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* 39-51 (2006).

385. *See, e.g.*, 42 U.S.C. § 1973 (LexisNexis 2012) (outlawing voting qualifications or prerequisites to voting based on race or color); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling practice of segregation in public school systems); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (pursuant to Equal Pay Act, prohibiting unequal wages for male and female employees in the same position).

merly unrecognized religions are subjected to prejudice because the “original” religion of a nation is given preferred treatment by the state.

As for Nussbaum, in the last analysis she thinks there may be a prudential basis for the Supreme Court to uphold the constitutionality of “under God,” and here her view converges with a similar line of argument by Greenawalt.³⁸⁶ But before turning to their explanations of why the Supreme Court might justifiably uphold the constitutionality of “under God,” I will examine Justice O’Connor’s claim that “under God” passes the endorsement test.

B. Evaluating Justice O’Connor’s Endorsement Test

Justice O’Connor’s concurring opinion in *Elk Grove* uses her endorsement test to determine whether “under God” is unconstitutional.³⁸⁷ If her claim is correct that the Pledge’s words do not entail government endorsement of religion, it might then obviate the need for the remedy that Eisgruber and Sager have proposed, that is, the availability of the alternative “under law” for those who object to “under God.”³⁸⁸ But their remedy may still be superior in important ways to the “leave-the-Pledge-alone” conclusion that O’Connor’s opinion recommends.³⁸⁹ For one thing, their remedy completely resolves the controversy, something that O’Connor’s opinion is unlikely to accomplish. We should keep this in mind as we explore her opinion with occasional references to our other theorists from Part I.

O’Connor agreed with Rehnquist that *Newdow* had standing, and she also agreed that the words “under God” did not offend the Establishment clause.³⁹⁰ Her reasons were based largely on the “endorsement” test, which in previous cases she had often said “captures the essential [meaning] of the Establishment Clause.”³⁹¹ That Clause, she contends, simply forbids government endorsement of religion.³⁹² The problem with the endorsement of a religion or religious belief is that it sends a message to those who do not adhere to the endorsed religion or belief that they are outsiders and not

386. See NUSSBAUM, *supra* note 7, at 314-15; see also GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 101.

387. See *Elk Grove*, 542 U.S. at 33-45 (O’Connor, J., concurring).

388. See EISGRUBER & SAGER, *supra* note 131, at 152.

389. See generally *Elk Grove*, 542 U.S. at 33-46 (O’Connor, J., concurring).

390. *Id.* at 33.

391. *Id.* at 33-36 (quoting *Cnty. of Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring in part and concurring in judgment)).

392. *Id.* at 34 (quoting *Cnty. Allegheny*, 492 U.S. at 627 (O’Connor, J., concurring in part and concurring in judgment) (noting “that the government must not . . . convey[] a message ‘that religion or a particular religious belief is favored or preferred’”).

full members of the political community.³⁹³ Of course, endorsement also sends a message to those who embrace the favored religion or belief—the “message that they are *insiders*, favored members of the political community.”³⁹⁴

O’Connor holds that in applying the endorsement test we cannot employ a subjective approach because that would lead to absurd results.³⁹⁵ “Nearly any government action could be overturned as a violation of the *Establishment Clause* if a ‘heckler’s veto’ sufficed to show that its message was one of endorsement.”³⁹⁶ For O’Connor, the test involves the point of view of a “reasonable observer,” which means that a practice will not be evaluated in isolation from its origins and context, for a reasonable observer, she asserts, is “aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.”³⁹⁷ Thus a reasonable observer would see no problem with the government, at least in some contexts, referring to or commemorating religion in public ways. O’Connor believes that “although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.”³⁹⁸ One secular purpose is simply to commemorate the place of religion in American history, such references being “the inevitable consequence of our Nation’s origins.”³⁹⁹ The lesson for the Court, O’Connor concluded, is therefore plain:

Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the *Religion Clauses* it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.⁴⁰⁰

One can appreciate the point O’Connor is making without agreeing with the conclusion she draws. Similar to Chief Justice Rehnquist and Justice Scalia,

393. *See id.*

394. *Elk Grove*, 545 U.S. at 34-35 (O’Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)) (emphasis added).

395. *Id.* at 34-35 (O’Connor, J., concurring).

396. *Id.* at 35 (O’Connor, J., concurring).

397. *Id.*

398. *Id.* (O’Connor, J., concurring).

399. *Elk Grove*, 545 U.S. 1 at 35 (O’Connor, J., concurring).

400. *Id.* at 35-36 (citations omitted).

she subtly endows historical meanings and traditions, established in our early history as a nation, with *unquestioned and continuing* relevance to contemporary *practices*.⁴⁰¹ That may be true of some instances (songs and mottoes, for example), but surely not to “under God,” which, as we have seen, was added to the Pledge during the Cold War in 1954 to proclaim America as a nation of religious people in contrast to the atheism (of some people) in the Soviet Union.⁴⁰² “Under God” was not inserted into the Pledge as a marker of past American belief, but as what Congress and President Eisenhower thought America should stand for in 1954.⁴⁰³

But consider another purpose of religious references in public life that O’Connor discusses: that such references serve to “solemnize” important public events. As she says, they serve

the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.⁴⁰⁴

O’Connor’s “reasonable observer” may be far different from a “heckler,” yet applying that standard is far more difficult than O’Connor indicates. Being aware of history and the specific origins of a given practice does not prevent a government from endorsing a religion or religious belief. Indeed, when we recall President Eisenhower’s words on the occasion of signing the congressional measure that added “under God” to the Pledge, it is impossible to avoid the conclusion that his words *were* an open and complete endorsement of religious belief in contrast to the alleged lack of belief in the Soviet Union.⁴⁰⁵ O’Connor’s “reasonable observer” would presumably be aware of President Eisenhower’s words, and would therefore conclude that they in fact constitute an undeniably plain and

401. See generally *id.* at 1; *Van Orden*, 545 U.S. at 677; *McCreary*, 545 U.S. at 844.

402. See NUSSBAUM, *supra* note 7, at 8.

403. *Id.*

404. *Elk Grove*, 545 U.S. at 36 (O’Connor, J., concurring) (citations omitted).

405. See LEEPSON, *supra* note 322, at 174.

extremely strong endorsement of religious belief, not a mere solemnization of “public occasions.”

More generally, O’Connor believes that the government is allowed to refer to God in a “discrete category of cases” without violating the First Amendment.⁴⁰⁶ She calls this category “ceremonial deism,” which, she asserts, “clearly encompasses such things as the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).”⁴⁰⁷ But it is certainly open to doubt whether Americans in general would agree to apply the label of “deism” to any or all of those examples. After all, deism is “the belief, based solely on reason, in a God who created the universe and then *abandoned* it, assuming no control over life, exerting no influence on natural phenomena, and giving no supernatural revelation.”⁴⁰⁸ Deism thus understood seems very unlike the major religions in the United States, a nation where God is widely believed to care about the world and its inhabitants in far more positive ways.⁴⁰⁹ By contrast to what deism stands for, we can be fairly certain that the proclamation issued by President Eisenhower was in no way referring to a deistic understanding of God.⁴¹⁰ Nonetheless, even though O’Connor concedes that it is a “close question,” she concludes, based on the following four factors, that the phrase “under God” in the Pledge of Allegiance is simply an example of this ceremonial deism.⁴¹¹ Let us look over those four factors.

History and ubiquity. According to O’Connor, when a certain practice has been observed for a lengthy period of the Nation’s history and by a great many people it is deemed ubiquitous, unlike novel or uncommon references to religion, which are more apt to be seen as instances of government endorsement.⁴¹² But the phrase “under God” has been a part of the Pledge for over fifty years and has become one of “our most routine ceremonial act[s] of patriotism[,]” recited by religiously diverse schoolchildren all over the country.⁴¹³ For O’Connor, this history and the

406. *Elk Grove*, 545 U.S. at 37 (O’Connor, J., concurring).

407. *Id.*

408. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 479 (4th ed. 2000). Justice William Brennan attributed the term “ceremonial deism” to Dean Eugene Rostow. *See Lynch*, 465 U.S. at 716 (Brennan, J., dissenting).

409. *See* Frank Newport, *More Than 9 in 10 Americans Continue to Believe in God*, GALLUP (June 3, 2011), <http://www.gallup.com/poll/147887/americans-continue-believe-god.aspx>.

410. *See* LEEPSON, *supra* note 322, at 174.

411. *Elk Grove*, 542 U.S. at 37 (O’Connor, J., concurring).

412. *Id.*

413. *Id.* at 38.

ubiquity of the practice render the Pledge and its phrase, “under God,” a part of our ceremonial deism.⁴¹⁴ Moreover, she notes, in over fifty years the practice has not engendered significant controversy apart from three lawsuits (including *Newdow*’s) that challenge the constitutionality of “under God.”⁴¹⁵

To be sure, O’Connor recognizes that “[i]t cannot be doubted that ‘no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside.’”⁴¹⁶ O’Connor would agree, then, that some long-standing practices must be cast aside even if there are few objections to them. Slavery, women’s subordination, and segregation are common examples of traditional practices that endured for long periods before they finally met with resistance and opposition on constitutional grounds.⁴¹⁷ Perhaps it is the case that Americans, most of whom are religious, have simply ignored the *constitutional* problem with “under God,” which O’Connor wrongly interprets as proof that it is *not* a problem.

No worship or prayer. A second factor supporting “under God” as a form of ceremonial deism, O’Connor suggests, is the absence of worship or prayer in the phrase.⁴¹⁸ No reasonable observer would conclude, she claims, that it constitutes a form of worship or an expression of religious faith, although it does purport “to identify the United States as a Nation subject to divine authority.”⁴¹⁹ But having acknowledged that the Nation is subject to such authority, it is difficult to comprehend how O’Connor can then say that any “religious freight the words may have been meant to carry originally has long since been lost.”⁴²⁰ If “under God” has long since lost all the religious significance that President Eisenhower’s 1954 proclamation attributed to it, then we cannot explain the angry reaction to the decision of the California appeals court, declaring “under God” unconstitutional, that immediately emanated from Congress, President Bush, and Justice Scalia as well as ordinary Americans. On this point, she cites an opinion of Justice William Brennan, who suggested that the reference to God in the Pledge *might* be permissible because it has “lost through rote repetition any

414. *Id.* at 37.

415. *Id.* at 38-39.

416. *Elk Grove*, 545 U.S. at 38 (O’Connor, J., concurring) (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 678 (1970)).

417. See sources cited *supra* note 385.

418. *Elk Grove*, 542 U.S. at 39 (O’Connor, J., concurring).

419. *Id.*

420. *Id.* at 41.

significant religious content.”⁴²¹ Of course, even if we were to concede that the meaning of “under God” has been lost, that should make us wonder why we must continue to defend its exclusive use instead of supplementing it with the secular alternative recommended by Eisgruber and Sager. And even if we also concede that Brennan’s statement may at least apply to older adults, we must surely doubt whether the phrase has lost its religious content for young, impressionable students who are asked to recite those words in their elementary school classrooms. It seems very unlikely that students of tender years will understand “under God” in terms of “deism,” as a reference to a god who has “abandoned” the universe.

No reference to a particular religion. It is certainly true and easily conceded that there is no explicit reference to or preference for one religion in the Pledge’s words. Nonetheless, “under God” does express a preference for religion over non-religion, a point that O’Connor seems to accept.⁴²² Yet she maintains that the “general acknowledgements of religion need not be viewed by reasonable observers as denigrating the nonreligious”⁴²³ (But it certainly *can* be viewed in that way, as Mr. Newdow obviously did.)⁴²⁴ The Pledge, O’Connor observes, “does not refer to a nation ‘under Jesus’ or ‘under Vishnu,’ but instead acknowledges religion in a general way: a simple reference to a generic ‘God.’”⁴²⁵ But while this reference to a generic God may not establish a particular religion, it still can offend the liberty of conscience of those who do not believe in God at all as well as those religions that do not recognize a supreme being.⁴²⁶ This is important because one of the principal purposes of the Establishment Clause was to protect liberty of conscience.⁴²⁷

Minimal religious content. Finally, the fourth factor that allegedly makes the Pledge a form of ceremonial deism is its minimal religious content and circumscribed reference to God.⁴²⁸ She claims that a brief reference to religion or to God in a ceremonial exercise is important for several reasons.

421. *Id.* (quoting *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting)).

422. *See id.* at 42.

423. *Elk Grove*, 542 U.S. at 42 (O’Connor, J., concurring).

424. *See generally id.* at 1 (majority opinion).

425. *Id.* at 42 (O’Connor, J., concurring).

426. *See id.*

427. *See, e.g.,* FELDMAN, *supra* note 43, at 27-33 (discussing the great importance of the idea of liberty of conscience to the framers of the First Amendment’s Religion Clauses). *See also* DWORKIN, *supra* note 91, at 76-77 (discussing citizens’ responsibility to choose their own ethical values and reject subordination to the collective power of government to make that choice for them).

428. *Elk Grove*, 542 U.S. at 42 (O’Connor, J., concurring).

First, it tends to confirm the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to ‘opt out’ of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.⁴²⁹

Still, it seems that acknowledging religion or solemnizing an event is, for all practical purposes, equivalent to endorsing religion. How can the acknowledgment of religion or the solemnization of an event not be an endorsement of religion?

Based on these considerations, O’Connor thinks “[t]he [mention] of ‘God’ in the Pledge . . . [is] a minimal reference to religion.”⁴³⁰ She points out that only two of the 31 words in the Pledge are challenged, and that those words are not even essential to the Pledge, since it existed for over fifty years without them.⁴³¹ And finally, she claims “students who wish to avoid saying the words ‘under God’ still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge.”⁴³² But it is quite possible that at least some students would experience more meaningful participation if, instead of omitting two words (opting out of language they find offensive), they could substitute the word “law” for “God,” as Eisgruber and Sager have recommended.⁴³³ And if the words “under God” are really “not even essential to the Pledge,” as O’Connor concedes, then omitting them altogether or having an alternative wording as an option is simpler as well as a way of avoiding needless controversy.⁴³⁴

It is not simply a matter of the number of words involved, or of whether those words are an essential part of the Pledge; nor is “minimal” related to the fact that students could still recite the Pledge without saying those words. Instead, as Eisgruber and Sager might say, it is the *social meaning* that students will reasonably attribute to those words that is important—the implication that there is a God, and that this Nation exists *under* God, with all of the many meanings that can flow from such an acknowledgement.⁴³⁵ It may be relatively harmless to apply the term “ceremonial deism” to

429. *Id.*

430. *Id.* at 43.

431. *Id.*

432. *Id.*

433. EISGRUBER & SAGER, *supra* note 131, at 151-152.

434. *See Elk Grove*, 542 U.S. at 43 (O’Connor, J., concurring).

435. EISGRUBER & SAGER, *supra* note 131, at 161-65.

references to the divine in this and other matters when it is a question of adults, who rarely recite the Pledge once they leave high school.⁴³⁶ But school children who recite the Pledge daily are unlikely to understand “under God” as an aspect of ceremonial deism. If we assume that children know the conventional meaning of “God,” they will likely conclude that the Nation has reason to believe in God and that in reciting the Pledge they, as individuals, are also proclaiming their belief in God. In short, it is impossible to deny that “under God” has significant and enduring religious meaning.

Finally, as Kent Greenawalt has argued, the Pledge may be acceptable under some circumstances,

but it remains difficult to justify the indoctrination of public school children. True, any child objecting to the Pledge can either be excused or remain silent, but this is an insufficient corrective. Many children will hesitate to appear unpatriotic or unreligious or both, and part of the problem of the Pledge is that it has some weak tendency to indoctrinate the uncommitted.⁴³⁷

As already noted, the Court left the underlying substantive issue in this case unresolved because it ruled that *Newdow* lacked standing to bring suit.⁴³⁸ But the issue is likely to return to the Court in the future as similar cases result in conflicting decisions in the lower federal courts.

C. Should the Supreme Court Uphold “under God”?

Despite their extensive criticism of the constitutionality of “under God,” both Greenawalt and Nussbaum advance arguments that would explain, and even support, at least under certain circumstances, a Supreme Court decision upholding “under God.” Their arguments are based on prudential grounds. Nussbaum, for example, thinks the Supreme Court would precipitate a national crisis were it to hold the words “under God” in violation of the Constitution.⁴³⁹ She writes,

[i]f there is uncertainty about the correct way of proceeding in such a momentous case, it is probably wise for the Court to avoid the issue as long as possible—hoping that, in the meanwhile, greater public understanding of Hinduism, Buddhism, and other related

436. See *Elk Grove*, 542 U.S. at 44 (O’Connor, J., concurring).

437. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 101.

438. *Elk Grove*, 542 U.S. at 16-17.

439. NUSSBAUM, *supra* note 7, at 314.

religions, as well as a greater appreciation for conscientious moral atheism and agnosticism, will undermine the perception that the opponents of the pledge are all dangerous subversives.⁴⁴⁰

Importantly, if Nussbaum is right about the severe consequences of the Court's striking down "under God," that would seem to indicate that "under God" is in reality a very strong endorsement of religion.

Greenawalt reaches a conclusion similar to Nussbaum's. In a long discussion of "mild endorsements and promotions" of religion by the state, and in light of our history and the enduring place of religion in our country, he believes it is "too harsh to say that every religious endorsement must now be purged."⁴⁴¹ Recognizing the relevance of the factors Justice O'Connor set forth in her endorsement test, he thinks the Pledge might be acceptable in part, but nevertheless difficult to "justify the indoctrination of public school children."⁴⁴² Thus the central issue boils down to "whether . . . the Court should [uphold] the Pledge for schoolchildren because a firestorm of criticism would follow a contrary decision and a constitutional amendment to reverse the outcome would be fairly likely."⁴⁴³

V. CONCLUSION

All of the models of the church-state relationship that were reviewed in Part I generally agree on at least a moderate sense of a necessary separation of church and state. Some take this position by means of forceful arguments against "subordination" of individuals to a collective determination of belief by state establishment or by defending the American tradition of liberty of conscience.⁴⁴⁴ Others also emphasize the limits of the separation metaphor by showing the ways in which our legal system does in fact treat religion equally in ways that are fair and reasonable without offending the core meanings of separation.⁴⁴⁵ Some of those core meanings entail a prohibition on indoctrination and the favoring of one religion or discriminating against those who have no belief. And finally, the state must avoid any undue interference with the individual free exercise of belief, which is grounded in the First Amendment's Free Exercise Clause. It is notable that favoring one religion or favoring religion itself entails

440. *Id.*

441. GREENAWALT, ESTABLISHMENT AND FAIRNESS, *supra* note 184, at 101.

442. *Id.*

443. *Id.*

444. See DWORKIN, *supra* note 91, at 76-77; NUSSBAUM, *supra* note 7, at 356, 362.

445. See EISGRUBER & SAGER, *supra* note 131, at 56-63.

“disparagement” and disrespect of those citizens who are not members of the favored religion or do not subscribe to any religion.

All of the above prohibitions are arguably violated in one way or another in two major Supreme Court opinions reviewed in Parts II and III. In the Ten Commandments case, *Van Orden v. Perry*, the display of the Commandments on public property both favors religion and a particular doctrinal version of the Commandments; it intrudes on the liberty of conscience of those who pass by the monument; and it interferes with the free exercise of belief by subordinating citizens to a collective determination of belief by the state.⁴⁴⁶ The Court would avoid these violations by arguing a dubious distinction between a “passive” presence of the Commandments on the Texas Capitol grounds and an “activist” presence in Kentucky classrooms in the earlier *Stone* case. But the Court’s main rationale is based on its ideological use of history, especially religious beliefs of some of the founders and a Presidential proclamation in the late eighteenth century that allegedly bind us today.

Finally, in the *Elk Grove* “under God” case, the same prohibitions are violated and the same ideological use of history is prevalent in Justice O’Connor’s concurring opinion.⁴⁴⁷ With one exception, the models of the church state relationship that were reviewed in Part I are in agreement that “under God” is a “violation of liberty” and presents several “constitutional vices.” But notwithstanding these severe criticisms of “under God,” there are some doubts whether the Supreme Court should declare “under God” unconstitutional or avoid the issue entirely until greater public understanding of non-Christian religions and conscientious moral atheism and agnosticism diminish the perception that the opponents of “under God” are all dangerous subversives. In that spirit, this Article contributes to that effort.

446. See generally *Van Orden*, 545 U.S. at 677; see *supra* Part I.B.

447. See generally *Elk Grove*, 542 U.S. at 33-45 (O’Connor, J., concurring); see *supra* Part III.B.